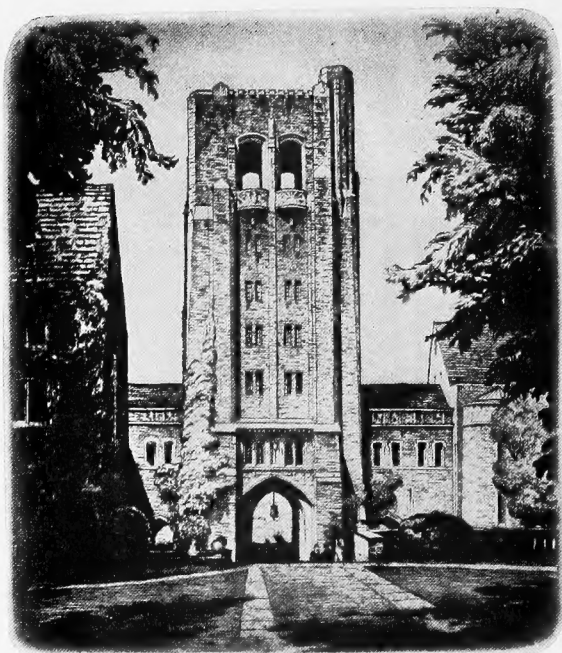


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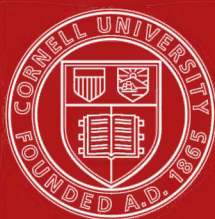
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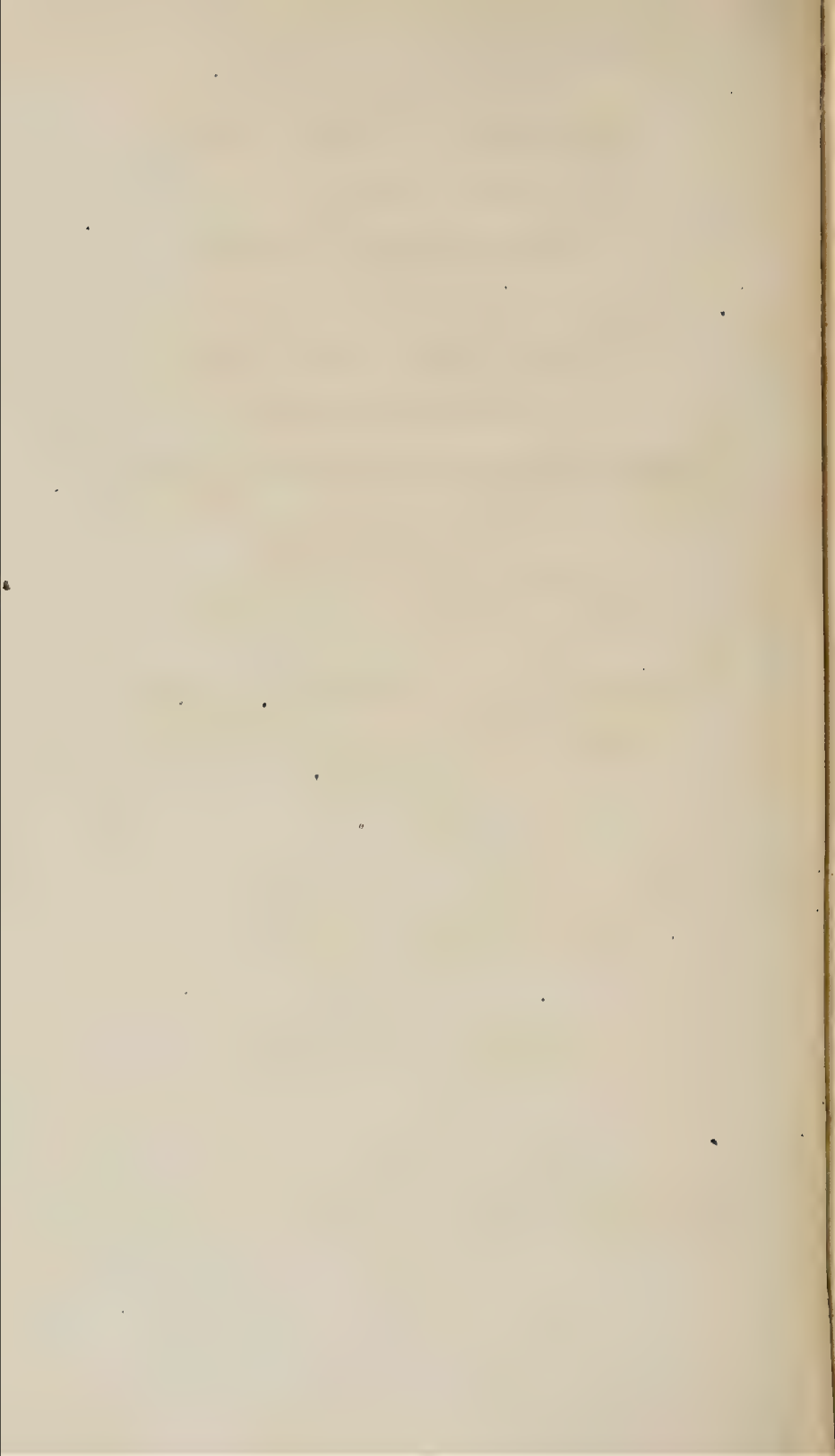
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BENEDICT'S TREATISE:

CONTAINING A SUMMARY OF THE

JURISDICTION, POWERS AND DUTIES

OF

JUSTICES OF THE PEACE

IN THE STATE OF NEW YORK,

Adapted to the Code of Procedure in Civil Cases.

ALSO, A PRACTICAL TREATISE ON THEIR

JURISDICTION, DUTIES

AND

AUTHORITY IN CRIMINAL CASES.

TOGETHER WITH A GREAT VARIETY OF FORMS.

IN TWO VOLUMES.

VOL. 1.

BY JOSEPH BENEDICT,
COUNSELLOR AT LAW, UTICA.

SIXTH EDITION.

GREATLY ENLARGED AND CAREFULLY CORRECTED.

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TO THE PUBLIC.

It is now twelve years since the Fourth Edition of my Treatise was issued, and I am grateful to be able to state that it has been received with favor by those who have had occasion to use it in the line of their business and profession.

Since that time, however, many important changes have been made in the law governing Justices' Courts, and the various special proceedings within their jurisdiction.

I have inserted in this edition much new matter, such as amendments made by the Legislature, and have cited authorities made by the various Courts, in order to give those doing business in Justices' Courts and within their jurisdiction, the benefit of the law governing these Courts, and defining their powers.

When we consider that the greater portion of the litigation in our country is settled by and before these Courts, no one will, for a moment, hesitate in saying that the latest alterations of the statutes, and the latest decisions of the appellate Courts, should be placed before them; and more especially when we realize that among the greater number of these Justices of the Peace, but very few, comparatively, have access to the Law Libraries of our country.

This edition will be found to contain all the forms necessary to be used under the various matters of which they have jurisdiction, and they have been abridged so as to conform to the spirit of the Code of Procedure in this State.

The law and practice in relation to criminal proceedings,

cognizable by and before Justices of the Peace, have been more carefully and extensively laid down in this, than any former Treatise of the kind in this State; and, I have no doubt, will be found a safe guide for all those doing business in that most important branch of the administration of our Government.

It will be perceived that a very important change has been made in the trial of those persons charged with crime. As the law now stands, any person on trial, charged with any crime whatever, may offer himself as a witness in his own behalf, and testify as in civil actions.

Commending it to the candid perusal and favorable consideration of all those interested in the faithful administration of the laws of our country, I submit it again to the public.

J. BENEDICT.

BENEDICT'S TREATISE.

PART I.

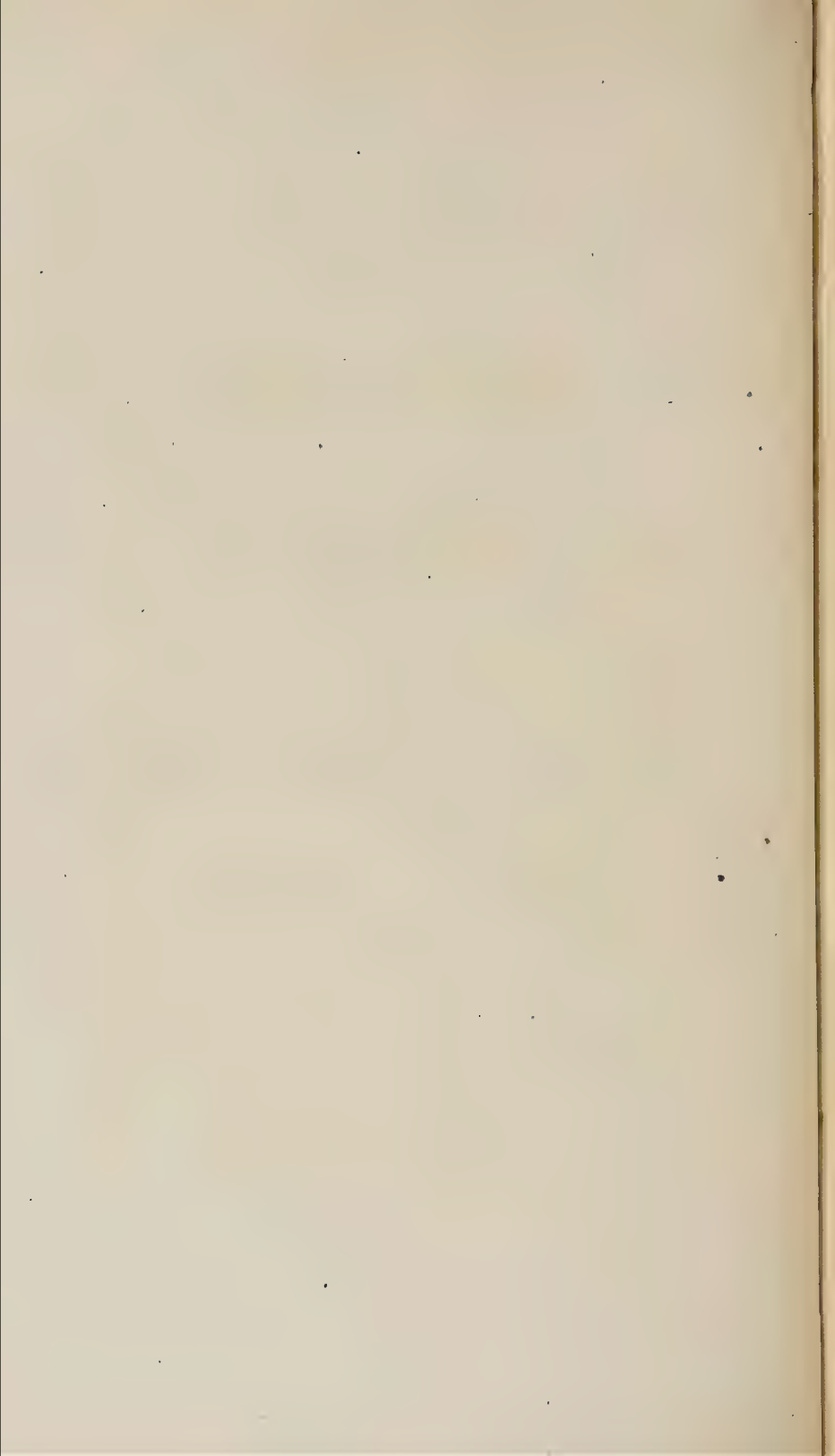
OF THE

JURISDICTION, POWERS AND DUTIES

OF

JUSTICES OF THE PEACE

IN CIVIL PROCEEDINGS.



BENEDICT'S TREATISE.

CHAPTER I.

OF THE JURISDICTION OF JUSTICES OF THE PEACE.

I. What Relates to the Justice Personally.

By the 18th section of the Amended Constitution of this State, it is provided as follows :

§ 18. The electors of the several towns shall, at their annual town meeting, and in such manner as the Legislature may direct, elect Justices of the Peace, whose term of office shall be four years. In case of an election to fill a vacancy occurring before the expiration of a full term, they shall hold for the residue of the unexpired term. Their number and classification may be regulated by law. Justices of the Peace and Judges or Justices of inferior Courts, not of record, and their Clerks, may be removed after due notice and an opportunity of being heard, by such Courts as may be prescribed by law for causes to be assigned in the order of removal. Justices of the Peace and District Court Justices shall be elected in the different cities of this State in such manner, and with such powers, and for such terms respectively, as shall be prescribed by law; all other judicial officers in cities whose election or appointment is not otherwise provided for in this article, shall be chosen by the electors of cities or appointed by some local authorities thereof.¹

¹ Article VI. Sections 18 and 19 of Amended Constitution of 1869.

§ 19. Inferior local courts of civil and criminal jurisdiction may be established by the Legislature; and except as herein otherwise provided, all judicial officers shall be elected or appointed at such times and in such manner as the Legislature may direct.

The Statute authorizing special elections to supply vacancies in certain town offices, does not extend to the office of Justice of the Peace.¹

The Constitution withholds from the Legislature the power of providing for the election of Justices of the Peace except at an *annual town election*.¹

The Legislature, in 1859, passed a law authorizing vacancies in the office of Justices of the Peace in the several towns of this state to be filled by the supervisor, town clerk, and justices of the said town, which statute reads as follows :

§ 1. Whenever there shall be a vacancy in the office of a justice of the peace in any town in this state, occurring after and in the same year of the regular annual town meeting in such town, the supervisor, town clerk, and remaining justices of the peace, or a majority of such officers, are hereby authorized by warrant under their hands and seals, to appoint a suitable person to fill such vacancy, and the person so appointed shall hold said office until the first day of January next succeeding such appointment. If the vacancy shall occur before the annual town meeting, it may be supplied by appointment in the same manner, and the person so appointed shall hold said office until the annual town meeting; and any person so appointed may qualify immediately in the same manner as if elected, and enter upon the discharge of the duties of said office.

§ 2. Every such appointment shall be filed in the office of the town clerk, and a copy thereof in the office of the county clerk before the person so appointed shall be authorized to act.² Every justice of the peace elected in any town of this state, or appointed for any city in which special courts are not established by law,³ is hereby autho-

¹ *Ex parte Quackenbush*, 2 Hill R. 369. ² See Sess. Laws 1859, chap. 476.

³ 3 R. S. page 426, 5th ed., § 1; 1 Kernan 281; 21 Barb. 546. General powers, 10 Wend 213; 2 Barb. 340.

rized to hold a court for the trial of all actions in the next section enumerated, and to hear, try and determine the same according to law and equity; and for that purpose, where no special provision is otherwise made by law, such court shall be vested with all the necessary powers which are possessed by courts of record of this state.

§ 3. Actions cognizable before a justice may be brought by and against all persons who sue or are sued in their own right, and by and against all town and county officers in their official character, and by executors and administrators, and by and against corporations.

The Legislature have no power to shorten the constitutional term of office of a Justice of the Peace.

This cannot be done indirectly by the erection or division of counties. Where a town is transferred from one county to another, or a new county made out of several towns, the Justices of these towns continue to hold their offices as Justices of the same town or towns in the new counties.

The office of a Justice of the Peace is a town office, though it has county powers.¹

Justices of the Peace must reside in the town for which they were chosen, and shall not try a civil cause in any other town, except in cases otherwise provided for by law.²

A Justice may, however, *issue* his process at any place in the county, taking care, in civil cases, to make it returnable in the town in which he resides.³

A person elected to the office of Justice of the Peace, and entering upon the discharge of its duties without having first taken the oath prescribed by the law, is nevertheless, a Justice of the Peace *de facto*, and his acts as such, so far as relates to the public and third persons, are valid.⁴

The office of a Justice of the Peace will not be vacated in consequence of an increase or diminution of his territorial jurisdiction, by the erection of a new town, or the annexing

¹ Session Laws 1849, chapter 28, § 1.

² 1 R. S. 5th ed., p. 383, 9 Wend. 319, 6 Cow. 642.

³ 9 Wend. 319.

⁴ Weeks vs. Ellis, 2 Barbour S. C. Rep. 320, and Cases cited.

of part of one town to another; he is allowed by law to serve out the full time for which he was elected.¹

No action to recover a penalty given to a town, can be brought before a Justice residing in the town for the benefit of which the same is prosecuted—it must be brought before some Justice residing in another town of the same county.²

The above provision applies only to cases where the penalty is given directly to the town in its corporate capacity.

Accordingly, where an action was brought before a Justice of the Peace in the name of the Overseers of the Poor, to recover the penalty given by 1 R. S. 680, § 15, for selling spirituous liquors without license, *held*, that though the penalty, when recovered, was to be applied to the use of the poor of the town of E, and the Justice resided there, he had jurisdiction.³

No Justice of the Peace, being an inn-holder or tavern-keeper in fact, shall have any power or jurisdiction under the provisions of title four of the second chapter of the third part of the Revised Statutes, but if a judgment shall have been actually rendered before a Justice before he became so disqualified, he may issue execution thereupon as in other cases.⁴

Under the Revised Statutes, the Supreme Court decided that a Justice of the Peace was not deprived of jurisdiction by being a tavern-keeper, provided he was such *at the time of his election*: otherwise of a Justice who had become a tavern-keeper *after his election*.⁵

That statute was amended, however, in 1846, and deprived a Justice of jurisdiction who was a tavern-keeper in fact.

Although, under the foregoing statutes, a Justice of the Peace is deprived of jurisdiction in certain cases, yet he is not disqualified to entertain proceedings against a person for refusing to work upon the road, on the complaint of an Overseer of Highways, although he is a tavern-keeper at the

¹ 1 R. S. 5th ed. p. 403, §§ 103, 104.

² 1 R. S. 5th ed. 837, § 5; 6 Hill, 59.

³ Wood vs. Rice, 6 Hill, 58, Nelson J.

⁴ 3 R. S. 5th ed. 427, §§ 2, 3, 4.

⁵ Parmelee vs. Thompson, 7 Hill 77. Bronson J.

time. Those statutes relate solely to the civil jurisdiction of Justices of the Peace under title four of the second chapter of the third part of the Revised Statutes, and do not interfere with the powers conferred by other statutes.¹

Relationship to one of the parties to an action before him, disqualifies a Justice from trying the cause; and should the Justice persist in trying the cause, after the fact properly appeared before him, the judgment he might render would be reversed—he should, therefore, dismiss the cause for want of jurisdiction.²

The relationship to one of the parties, however, should be so near as to amount, of itself, to strong presumption of partiality or fraud.

It has been determined that it is no objection that the Justice is half uncle to the plaintiff's wife.³

In another case the *Court say* that the Justice who admitted that he was a son-in-law of the plaintiff, insisted on retaining jurisdiction, was of itself evidence that the trial was not fair and impartial, and reversed the judgment.⁴

In a recent *case*, however, the Supreme Court decided that the following section of the statute applies to *Justices of the Peace*, viz :⁵

No Judge of any Court *can sit* as such in any cause to which he is a party or in any way interested, or in which he would be excluded from being a juror, by reason of *consanguinity or affinity* to either of the parties.

He cannot entertain an action where he is within the ninth degree of kin, either by consanguinity or affinity to either of the parties. The *degrees* of consanguinity are determined by commencing with the common ancestor of the persons between whom they exist, and counting each generation downwards to the one farthest removed. The number of generations denotes the degree. Thus, if both are grandchildren of a common ancestor, they are cousins in the third degree; if one is a grandchild and the other a great-grandchild, they are cousins in the fourth degree.

¹ Rice & Thorp vs. Milks, 7 Barbour, 337.

² 17 John. R. 133.

³ 13 John. R. 191.

⁴ 19 John. R. 172.

⁵ Edwards vs. Russell, 21 Wend. 63, Cowen J.

Degrees of affinity are determined by regarding a husband or wife of a blood relative of the same degree as such relative. Kin by affinity ceases on the death of the blood relative whose marriage occasioned it, unless there be issue of the marriage, in which case the blood of the issue keeps up the affinity. Thus, a father is no longer of kin to his daughter-in-law, after the death of her husband, unless she have children. If she have children, the blood relationship between the children and their grandfather and their mother preserves the affinity.¹

It is often made an inquiry how the fact shall be made to appear to the Justice ?

The Court, Cowen J., say the Justice may withdraw himself on *his* mere suggestion, and such is the uniform course with other Judges.²

He cannot sit. If he did, his acts would be void ; any judgment rendered by him is, therefore, void.

So, too, it has been decided under this statute, that a Justice of the Peace, whose wife is the sister of A.'s wife cannot take jurisdiction of a cause in which A. is the *plaintiff in interest*, though prosecuted in the name of another ; and if he render judgment therein, it may be treated as *absolutely void*. A judgment rendered under such circumstances is *coram non judice*, and may be questioned collaterally.³

If a justice should, therefore, issue a process, contrary to the foregoing section, and on ascertaining the fact, should render a judgment against the plaintiff for costs, the *judgment* would be *reversed*. *The Court* say he should not render any judgment at all.⁴

The entire want of a jurisdiction in the Justice may be *shown* or raised at any stage of the proceedings.

The safer course would be, when the Justice discovers that the process issued, or the proceedings taken, are contrary to the above section of the statute, or when there is doubt in the mind of the Justice, to dismiss the proceedings, and render no judgment whatever in the matter.

¹ 3 Comstock R. 547.

² 21 Wend. 63.

³ Foot vs. Morgan, 1 Hill, 954, Cow. J.

⁴ 1 Hill, 654, Cowen J.

II. Of the Parties to Civil Actions.

By the 15th subdivision of § 64 of the Code of Procedure, it is provided, that the forms of action, parties to actions, the rules of evidence, the time of commencing actions, and the service of process upon corporations, as therein provided, shall apply to Justices' Courts.

The subdivision will be found under its appropriate head in chap. 2d of this work, and is intended to apply to these courts so far as they can reasonably be made applicable.

It is, therefore, necessary to insert in this work Title III of the Code, which reads as follows :

TITLE III.

Of the parties to civil actions.

- SECTION 111.** Action to be in the name of the real party in interest.
- 112. Assignment of a thing in action not to prejudice a defence.
 - 113. Executor or trustee may sue without the persons beneficially interested.
 - 114. When married woman is party, her husband to be joined, except, etc.
 - 115. Infant to appear by guardian.
 - 116. Guardian, how appointed.
 - 117. Who may be joined as plaintiffs.
 - 118. Who may be joined as defendants.
 - 119. Parties united in interest, when to be joined; when one or more may sue or defend for the whole.
 - 120. Plaintiff may sue in one action the different parties to commercial paper.
 - 121. Action, when not to abate by death, marriage or other disability, etc.; proceedings in such cases.
 - 122. Court when to decide controversy, or to order other parties to be brought in.

§ 111. [91.] (Am'd, 1849, 1851, 1862, 1866.) *Action to be in the name of the real party in interest.*

Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section one hundred and thirteen; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract. But an action may be maintained by a grantee of land in the name of a grantor, or his or her heirs or legal representatives, when the grant or grants are void by reason of the actual possession of a person claiming un-

der a title adverse to that of the grantor at the time of the delivery of the grant, and the plaintiff shall be allowed to prove the facts to bring the case within this provision.

§ 112. [92.] (Am'd, 1849.) *Assignment of a thing in action not to prejudice a defence.*

In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defence existing at the time of or before notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due.

§ 113. [93.] (Am'd, 1851.) *Executor or trustee may sue without the persons beneficially interested.*

An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another.

§ 114. [94.] (Am'd, 1851, 1857.) *When married woman is party, her husband to be joined, except, etc.*

When a married woman is a party, her husband must be joined with her, except that:

1. When the action concerns her separate property, she may sue alone.
2. When the action is between herself and her husband she may sue or be sued alone.

And in no case need she prosecute or defend by a guardian, or next friend.

§ 115. [95.] (Am'd, 1849.) *Infant to appear by guardian.*

When an infant is a party, he must appear by guardian, who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or a county judge.

§ 116. [96.] (Am'd, 1849, 1851, 1852, 1862, 1863, 1865.) *Guardian, how appointed.*

The guardian shall be appointed as follows:

1. When the infant is plaintiff, upon the application of

the infant, if he be of the age of fourteen years ; or, if under that age, upon the application of his general or testamentary guardian, if he has any, or of a relative or friend of the infant ; if made by a relative or friend of the infant, notice thereof must first be given to such guardian, if he has one ; if he has none, then to the person with whom such infant resides.

2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within twenty days after service of the summons. If he be under the age of fourteen, or neglect so to apply, then upon the application of any other party to the action, or of a relative or friend of the infant, after notice of such application being first given to the general or testamentary guardian of such infant, if he has one within this estate ; if he has none, then to the infant himself if over fourteen years of age, and within the state ; or, if under that age, and within the state, to the person with whom such infant resides. And in actions for the partition of real property, or for the foreclosure of a mortgage or other instrument, when an infant defendant resides out of this state, or is temporarily absent therefrom, the plaintiff may apply to the court in which the action is pending, at any special term thereof, and will be entitled to an order designating some suitable person to be the guardian for the infant defendant, for the purposes of the action, unless the infant defendant, or some one in his behalf, within a number of days after the service of a copy of the order, which number of days shall be in the said order specified, shall procure to be appointed a guardian for the said infant, and the court shall give special directions in the order for the manner of the service thereof, which may be upon the infant.

And in case an infant defendant having an interest in the event of the action shall reside in any state with which there shall not be a regular communication by mail, on such fact satisfactorily appearing to the court, the court may appoint a guardian *ad litem* for such absent infant party, for the purpose of protecting the right of such infant in said action ; and, on such guardian *ad litem*, process, pleadings

and notices in the action may be served in the like manner as upon a party residing in this state.

§ 117. [97.] *Who may be joined as plaintiffs.*

All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title.

§ 118. [98.] (Am'd, 1849, 1867.) *Who may be joined as defendants :*

Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein ; and in an action to recover the possession of real estate, the landlord and tenant thereof may be joined as defendants ; and any person claiming title or a right of possession to real estate may be made parties plaintiff or defendant as the case may require, to any such action.

§ 119. [99.] (Am'd, 1849.) *Parties united in interest, when to be joined ; when one or more may sue or defend for the whole.*

Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants ; but if the consent of any one, who should have been joined as plaintiff, cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint, and when the question is one of a common or general interest of many persons ; or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

§ 120. [100.] *Plaintiff may sue in one action the different parties to commercial paper.*

Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes may, all or any of them, be included in the same action, at the option of the plaintiff.

§ 121. [101.] (Am'd, 1849, 1857, 1862, 1869, 1870.) *Action, when not to abate by death, marriage or other disability, etc. ; proceedings in such case.*

No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, marriage, or other disability of a party, the court on motion, at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action.

After a verdict shall be rendered in any action for a wrong, such action shall not abate by the death of any party, but the case shall proceed thereafter in the same manner as in cases where the cause of action now survives by law.

At any time after the death, marriage, or other disability of the party plaintiff, the court in which an action is pending, upon notice to such persons as it may direct, and upon application of any person aggrieved, may, in its discretion, order that the action be deemed abated unless the same be continued by the proper parties, within a time to be fixed by the court, not less than six months nor exceeding one year from the granting of the order. And where judgment has heretofore or shall hereafter be recovered for the possession of real property, and the party recovering said judgment shall have died subsequent to the recovery thereof, his successor in interest in said land, whether by grant, devise or inheritance, may revive said judgment and enforce the same by execution, on motion, within one year after said death, or afterwards on supplemental complaint.

Where an intestate, not being an inhabitant of the state, shall die out of this state, not leaving assests therein, and there shall be pending in the supreme court, or in the court of appeals, an appeal brought by such intestate from a judgment against him, the court in which said appeal is pending may order the judgment appealed from affirmed, with costs, unless the attorney for the intestate on said appeal procure said action to be revived, within six months

after notice, to perfect such appeal, by the substitution of a representative of said intestate in said action.

§ 122. [102.] (Am'd, 1849, 1851.) *Court when to decide controversy, or to order other parties to be brought in.*

The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in. And when, in an action for the recovery of real or personal property, a person, not a party to the action, but having an interest in the subject thereof makes application to the court to be made a party, it may order him to be brought in by the proper amendment.

A defendant, against whom an action is pending upon a contract, or for specific, real or personal property, may, at any time before answer upon affidavit, that a person, not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party on his depositing in court the amount of the debt, or delivering the property, or its value, to such person as the court may direct; and the court may, in its discretion, make the order.

The Supreme Court say that when a public office is instituted by the Legislature, an implied authority is conferred on the officer or officers, to bring all suits as incident to his office, which the proper and faithful discharge of the duties of his office require.¹

The statute, however, expressly authorizes suits to be brought by the Supervisors of the county; the Loan officers and Commissioners of Loans of a county; the County Superintendents of the Poor, Supervisors of Towns, Overseers of the Poor, Commissioners of Common Schools, Commissioners of Highways, Trustees of School Districts, Trustees of School and Gospel Lots, etc., upon any contract lawfully

¹ 18 John. R. 418; 12 How. Pr. R. 867.

made with them or their predecessors in their official character, to force any liability or any duty enjoined by law upon such officers, or the body they represent, and to recover damages for any injuries done to the property or rights of such officers, or the bodies represented by them.¹

The officers above named are authorized to bring such actions in the name of their respective offices, notwithstanding the contract or obligation on which the same is founded, may have been made with or to any of their predecessors in office, in their individual name or otherwise. But in all cases the action should be brought in the name of the officer, with the addition of his name of office, and not merely in the name of the office.²

As a general rule, all public officers though not expressly authorized to sue by statute, have a capacity to sue commensurate with their public trusts and duties.³

In actions either *by* or *against* any of the officers named in 2 R. S. 473, § 92, the individual name of the incumbent *must* be used with the addition of his name of office. Accordingly where the action was brought in the name of *The Supervisor of the Town of G.*, without mentioning the name of the incumbent, *held*, that it could not be maintained.⁴

It is proper to observe here, that when a suit is brought by or against the Board of Supervisors, the county Superintendents of the Poor of any county, or against any Town, or the Supervisor, or the Overseers of the Poor in their official character, and judgment is obtained against them, *no execution can be issued on such judgment*, but the same is to be presented to the next Board of *Supervisors* of the county, in the manner prescribed by *law*. See 3 R. S. page 774, § 106, 5th ed.⁵

In actions on contract. Prior to the adoption of the Code Procedure, actions upon contract, with a few exceptions,

¹ 3 R. S. 774, § 105, 5th ed.; 2 Kern. 52.

² 3 R. S. 775, § 109; 19 Barb. 179.

³ The Supervisor of the town of Galway agt. Stimson, 4 Hill 136, Bronson J.

⁴ 18 John. 407; 1 Cowen, 260; Avery vs. Slack, 19 Wend. 50, Cowen J.

⁵ 3 R. S. 5th ed. 776. § 120.

were required to be prosecuted in the name of the person to whom the contract was made. The exceptions to the rule arose in the case of bills of exchange and negotiable promissory notes, and in a few other cases provided by statute. The Code of Procedure has changed the rule and requires that every action must be prosecuted in the name of the party in interest, except that when a married woman is a party, her husband must be joined with her, unless the action concerns her separate property, or is between herself and her husband, when she must sue alone.¹ As a cause of action not arising upon contract is not assignable,² the provision in effect simply extends to the assignee of a contract, whether express or implied, the right to bring an action upon it in his own name.

If the contract is joint and several, the action may be brought against all of the contracting parties in default or against any one of them severally. Where there are a number of persons named as contractors, they will be deemed joint contractors, unless it is otherwise expressed in the contract. If, however, a promissory note be drawn, "I promise to pay," &c., and subscribed by two or more persons, it is held to be a joint and several note.³

If the action be upon a joint contract, it should be brought against all the parties liable upon it; and if it is not so brought, the want of proper parties will be a good answer.⁴ If, however, the want of proper parties be not set up in the answer, it will be too late to make the objection at the trial; and if the contract is there proved to have been made by the defendants and other persons as joint contractors, it will be sufficient to warrant a recovery against the defendants named.⁵ The provision contained in the eleventh subdivision of section sixty-four of the Code of Procedure, authorizing the amendment of the pleadings at any time before trial, during the trial or upon appeal, when by such amendment substantial justice will be promoted, although it enables a Justice to obviate any objection arising upon the pleadings, does not by its terms reach the case of an improper joinder

¹ Code of Procedure, § 4.

² 7 Mass. 58.

⁴ 1 Chit. Pl. 47.

³ Id. § 111.

⁵ 1 Barn. & Ald. 224.

of persons as defendants, and the ancient rule would therefore seem to govern in such cases.¹

There are some cases in which a person may sue for the recovery of damages for the breach of a contract to which he is not a party and to whom there has not been any assignment of the right of action. Where one person pays money or delivers property to another, and the latter in consideration thereof promises to pay a certain sum of money to some third person, such third person may maintain an action in his own name to recover the sum specified, although no consideration moves from the party who brings the action.²

Although by the fifteenth subdivision of section 64 of the Code the foregoing sections are made applicable to Justices' Courts, they should be so construed as not to give Justices' Courts any new or extraordinary powers, such as bringing in new parties, striking out the name of some of the parties in an action on contract and the like; and the *Court say*, in *Gates agt. Ward*, 17 Barbour R. 427, that the rules prescribed by the Code, as to the necessary parties to an action are applicable to these Courts, so far as consistent with their constitution and duties, and no farther; they have no power to amend the process or pleadings in an action against two or more defendants on a joint contract, by striking out the name of a co-defendant and rendering judgment against one and in favor of the other.³

III. *By Executors and Administrators.*

Although the statute deprives the Justice of jurisdiction of suit against executors and administrators, and allows suits to be brought and maintained *by* executors and administrators, yet, if a suit be brought by them before a Justice, the defendant may plead or give notice of set-off, and if he prevails, may have judgment against the plaintiff in his or their, (as the case may be,) representative character, which shall be evidence of a debt established

¹ Webster vs. Hopkins, 11 How. Pr. 140; 17 Barb. R. 424.

² Barker agt. Bucklin, 2 Denio, 45; Hale agt. Boardman, 27 Barb. 82; 6 E. P. Smith, 304.

³ 11 How. Pr. R. 140; 17 Barb. 427.

to be paid in the course of the administration, *but execution* shall not issue thereon until directed by the Surrogate who granted the letters of administration, and if the defendant neglects to put in his set-off, according to the preceding section of the statute, he will be precluded from ever after collecting his demand.¹

By the Revised Statutes "no executor or administrator shall be chargeable upon any special promise to answer damages or to pay debts of the testator or intestate, out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, be in writing and signed by such executor or administrator, or by some other person by him thereunto specially authorized." The promise must be made upon some valid and sufficient consideration to the executor or administrator as well as reduced to writing and signed.² And where an administrator gives his note for the debt of his intestate, he cannot be made personally liable upon it, unless it is shown that he has assets or that forbearance was the consideration; and where this is not proved, the Court will not infer it from the fact that the note is payable in sixty days.³

A transfer by one of several executors or administrators is as valid as a transfer by all of them; Bogert agt. Hertell, 4 Hill 492, and cases cited. This rule applies as well to notes and other securities given to executors as such after the death of their testator as to those given to him in his lifetime; Nelson, Ch. J. Money deposited by one as executor may be sued for and recovered by him in his own right.⁴

Executors and administrators stand in the place of their testator or intestate, and may bring an action for taking, detaining or injuring his goods, or the goods which have come to their hands,⁵ and in like manner may the trustee of an express trust.⁶ And where an action of trover was brought by a son entitled to succeed to his father's personal

¹ 3 R. S. 656, 5th ed. §§ 16, 17; 8 Wend. 530; 21 Wend. 675; 6 Barb. 330.

² 3 R. S. 201, 5th ed. § 1.

³ 9 Wend. 273.

⁴ Cheney agt. Beals, 47 Barb. 523.

⁵ 1 Pick. 389; Code of Procedure, § 113; 5th ed. R. S. vol. 3, p. 201.

⁶ Id.

estate for its conversion, although it was shown that no letters of administration had been granted, the action was sustained.¹

In suits brought by executors or administrators the defendant may set off demands existing against their testators or intestates, and belonging to the defendant at the time of their death, in the same manner as if the action had been brought by and in the name of the deceased.

To enable a set-off to be made in actions brought by executors and administrators under sections fifty-five and fifty-six of the statute, it is necessary that the demand must have belonged to the defendant at the time of the death of the testator or intestate. In case the set-off established in such case exceeds the plaintiff's demand, the judgment rendered in the defendant's favor is not collectable against the plaintiff out of his goods and chattels, but is merely evidence of a debt established, payable in the course of administration and upon which execution cannot issue until ordered by the Surrogate.²

Where a co-partnership executes a note in the name of the firm and one of the partners dies, his executors cannot be joined with the surviving partners in a suit upon the note. The creditor is bound to resort to his legal remedy against the surviving debtors.³

On the appointment of an administrator, the personal property of the intestate vests in him by relation from the death of the intestate, and he may lawfully bring trespass for unlawfully taking goods or property of the intestate, after his death and before administration granted. He may also maintain an action for a trespass committed on the real estate, or for taking and carrying away the goods of the intestate in his lifetime.⁴

So an administrator could always bring trover in his own name, without declaring in his representative capacity, for the goods of his intestate, *converted* after his death, even though the conversion was before the granting of letters of

¹ 7 Wend. 354.

² 3 R. S. 5th ed. p. 201.

³ 2 Denio, 577; 18 Barb. 592.

⁴ Rockwell vs. Sanders, 18 Barb. 473, and many cases cited.

administration, because the granting of administration related back to the time of the death, and gave the administrator title by relation. (Valentine agt. Jackson, 9 Wend.) This has not been changed by the Code.¹

§ 317. (Am'd, 1851, 1852.) *Costs in an action by or against an executor or administrator, trustee of an express trust, or a person expressly authorized by statute to sue.*

In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered as in an action by and against a person prosecuting or defending in his own right, but such costs shall be chargeable only upon, or collected of, the estate, fund or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in such action or defence. But this section shall not be construed to allow costs against executors or administrators, where they are now exempted therefrom, by section 41 of title 3, chapter 6 of the second part of the revised statutes; and whenever any claim against a deceased person shall be referred pursuant to the provisions of the revised statutes, the prevailing party shall be entitled to recover the fees of referees and witnesses and other necessary disbursements, to be taxed according to law. And the court may, in its discretion, in the cases mentioned in this section, require the plaintiff to give security for costs.²

IV. By and against Corporations.

Justices of the Peace have jurisdiction in suits against corporations and may issue a summons as in other cases. In actions against corporations, the Code of Procedure provides, that the summons which is issued in the same manner as against natural persons, may be served by delivering a copy to the president or other head of the corporation, secretary, cashier, treasurer, a director or managing agent thereof; but the service can be made in respect to a foreign

¹ Sheldon vs. Hoy, 11 How. R. 11.

² 30 N. Y. R. 294.

corporation only when it has property within the state, or the cause of action arose therein.¹

A county is a corporation—so also

A town is a corporation.

A *county* must sue in the name of the Board of Supervisors thereof, except when county officers shall be authorized by law to sue by their name of office for the benefit of the county.²

In all legal proceedings against the Board of Supervisors the first process, and all other proceedings requiring to be served, shall be served on the chairman or clerk of the Board.³

A town must sue by its name, except when town officers shall be authorized by law to sue in their name of office for the benefit of the town.

Actions therefore can be brought before a Justice of the Peace against either a county or a town in its corporate capacity, subject to the restrictions and limitations contained in section fifty-four of the Code of Procedure.⁴

The *managing agent* upon which a process can be served must be one whose agency extends to all the transactions of the corporation.

The process against corporations may be issued as in other cases, and may be served on the presiding officer, secretary, cashier, treasurer or any director or trustee thereof, by whatever name such director or trustee may be called, and although a Justice has no jurisdiction of a suit against a foreign corporation, such corporation may confer jurisdiction by appearing and answering without objecting to the jurisdiction.

Personal service upon the managing agent of a corporation is personal service upon the corporation itself, and if the constable's return shows such a service, the jurisdiction of the Justice is established and his judgment will be regular on its face.⁵

¹ Code of Procedure, § 134.

² 3 R. S. 774, § 105; 2 Kernan, 52; 19 Barb. 179; 4 Hill, 187.

³ 1 R. S. 901, § 3, 5th ed; 2 Kernan, 52; 18 Barb. 574.

⁴ Brewster vs. The Mich. Railroad Company, 5 How. 183; 9 How. 448; 2d E. D. Smith, 519.

⁵ 18 Barb. 574.

A railroad corporation whose road passes through two or more counties, may be sued before a Justice in either county, provided the process can be served on the proper officer in such county. A railroad company must be treated as an inhabitant and freeholder in each county where its track is laid, therefore a summons issued against such a company by a Justice of the Peace must be made returnable not less than six nor more than twelve days from the time of service. A summons against a corporation returnable within three days is a nullity. The Justice has no jurisdiction over the corporation as a non-resident. It is irregular for the same person to appear as attorney for both parties on the return of summons issued by a Justice.

It should appear by the return to a summons issued by a Justice against a corporation in what manner the process was served, so that the Justice may be able to determine whether it was served on the proper officer.¹

V. Residence of the Parties.

The statute restricts the jurisdiction of a Justice of the Peace in respect to the residence of the parties.²

Thus, every action must be brought before some Justice of the town wherein either of the plaintiffs or any one of them reside, or where the defendants or any one of them reside, or before some Justice of another town in the same county next adjoining the residence of the plaintiff or defendant.³

The above rule has, however, the following exceptions :

1. If the defendant has absconded from his residence, the action may be brought before a Justice of the town in which such defendant *or his property* may be.⁴

The words in italics probably have reference to suits commenced by attachment, of which I shall treat in its proper place in this Treatise.

2. If the plaintiffs be all non-residents of the county, or the defendant be a non-resident of the county, then such

¹ 15 Barb. 650; 11 Barb. 621.

² 7 Wend. R. 452.

³ 3 R. S. 427, § 6.

⁴ 3 R. S. 427, § 7.

action may be brought before any Justice of the town in which such plaintiff or defendant may be.¹

Joint debtors may be sued in a Justices' Court by long summons, though one of them be a non-resident of the county. (Burghart vs. Rice, 2 Denio, 95. Harriott vs. Van Cott, 5 Hill, 285.) So a person having no legal residence anywhere, it seems may be sued by a long summons. That process is appropriate unless the defendant is a *non-resident* of the county. (Barnes vs. Harris, 4 Comstock, 374, and many cases cited.) In Hunter vs. Burtis and Ellsworth, 10 Wend. Rep. 385, it was decided by the Supreme Court, that a suit in favor of a non-resident plaintiff may be brought before any Justice of the county.

VI. *The Amount in Controversy.*

Suits cognizable before a Justice of the Peace may be brought in all cases, where the debt or balance due, or the damages *claimed*, shall not exceed two hundred dollars.²

If the plaintiff state his demand for more than two hundred dollars, but claim only a balance of two hundred dollars, the Justice has jurisdiction and the proceedings will be deemed regular.

If, however, a Justice issue a summons stating a cause of action for more than *two hundred dollars*, it is a nullity, and lays the defendant under no obligation to appear and answer to it.²

A Justice has no jurisdiction where the sum total of the accounts of both parties, *proved on the trial* to the satisfaction of the Justice, shall exceed four hundred dollars, but when accounts have been settled, the balance only shall be regarded as an item of account; where payments have been made, expressly in satisfaction of the plaintiff's demand, neither the payments so made, or that portion of the demand

¹ 3 R. S. 427, § 7; 10 Wend. 360.

² Yager vs. Hannay, 6 Hill R. 631. The Code now authorizes \$200 to be inserted in the summons or warrant.

so satisfied by said payments, shall form any part of said accounts.¹

In an action in which the plaintiff demanded judgment for three hundred and thirty-six dollars, and interest, the defence was payment and counter claim of two hundred dollars. On the trial, the plaintiff's claim was found to be two hundred and sixty dollars and ninety-two cents, and that the defendant had made payments on account to the amount of ninety-five dollars and eighty-five cents, and had a counter claim to the amount of one hundred and thirty-six dollars and forty-three cents. It was held the amounts between the parties did not exceed four hundred dollars.²

A Justice of the Peace has no jurisdiction of an action for taking personal property where the Plaintiff in his complaint claims more than two hundred dollars. In such a case, a judgment in favor of the plaintiff will be reversed after a trial upon the merits, without objection.³ (These cases will apply where the plaintiff claims more than two hundred dollars.—ED.)

Where the amount of the accounts still subsisting is a question of fact, and the evidence is conflicting the determination of the Justice is necessarily as conclusive on such question of fact, as upon any other and cannot be disturbed.⁴

Section 54 of the Code of Procedure takes from a Justice of the Peace, jurisdiction of a case, when the amount of the accounts of *both* parties exceed \$400, and the 4th subdivision invests the Justice with the power of adjudicating this question and fixes the time *when* he may decide it (*viz.*) when the fact shall be proved to his satisfaction. This period cannot arrive until the trial has commenced and the proof entered upon.

Until he decides that question he has jurisdiction to act.⁵ It is a judicial finding upon a hearing of both parties.

¹ 2 R. S. 159, § 4; 2 Cow. R. 413, *Matteson vs. Bloomfield*; 10 Wend. R. 555, 557, Note Ex parte *Mills vs. N. Y. Com. Pleas*; 4 Denio, 870, 871; *Parker vs. Eaton*, 25 Barb. 122.

² Crim agt. *Croukhite*, 15 How. 280.

³ 14 Barbour 250; 6 Hill 631; 5 Barb. 574.

⁴ 25 Barb. 122.

⁵ *Glackin vs. Zeller*, 52 Barb. 147.

CHAPTER II.

I. Of the Courts held by Justices of the Peace and the Proceedings therein.

Remedies in the Courts of Justice are divided into :

1. Actions ;
2. Special Proceedings.

An action is an ordinary proceeding in a Court of Justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence.

Every other remedy is a special proceeding.

Actions are of two kinds :

1. Civil ;
2. Criminal.

A criminal action is prosecuted by the people of the State, as a party, against a person charged with a public offence, for the punishment thereof.

Every other is a civil action.

Where the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

The following sections comprise the law as laid down in the Code of Procedure in relation to Justices' Courts.

Of the courts of the justices of the peace.

SECTION 52. Repeal of certain existing provisions.

53. Jurisdiction of these courts.

54. Jurisdiction in civil actions limited.

55. Answer of title to land.

56. Undertaking therein.

57. Suit before justice to be discontinued; costs.

58. Proceedings if undertaking not given.

59. The same.

60. New action in supreme court ; pleadings therein.

61. Costs of action in supreme court.

- 62. Proceedings where several causes of action, and answer of title as to one.
- 63. Docketing justices' judgments and effect thereof.
- 64. Rules in justices' courts.
 - Rule 1. The pleadings.
 - 2. Pleadings, how put in.
 - 3. Complaint.
 - 4. Answer.
 - 5. Pleadings, what to contain.
 - 6. Demurrer.
 - 7. Proceedings in demurrer.
 - 8. Plaintiff to prove his case if defendant do not appear.
 - 9. Proceedings in action on account, or instrument for the payment of money only.
 - 10. Variance, when disregarded.
 - 11. Amending pleadings.
 - 12. Executions, when issueable and returnable.
 - 13. Execution on justices' judgment docketed.
 - 14. Requiring party to exhibit his account.
 - 15. Certain provisions applicable to these courts.

§ 52. [45.] *Repeal of certain existing provisions.*

The provisions contained in sections two, three and four, of the article of the revised statutes entitled, "Of the jurisdiction of justices' courts," as amended by sections one and two of the act concerning justices' courts, passed May fourteenth, one thousand eight hundred and forty, and the provisions contained in sections fifty-nine to sixty-six, of the same article, both inclusive, are repealed, and the provisions of this title substituted in place thereof. But this repeal shall not affect any action heretofore commenced in a court of a justice of the peace.

§ 53. (46.) (Am'd, 1849, 1851, 1860, 1861, 1862, 1865.)
Jurisdiction of these courts.

Justices of the peace shall have civil jurisdiction in the following actions, and no others; excepting as in the second section it is provided :

1. In actions arising on contracts for the recovery of money only if the sum claimed does not exceed two hundred dollars.

2. An action for damages for injury to rights pertaining to the person, or to personal or real property, if the damages claimed do not exceed two hundred dollars.

3. An action for a penalty not exceeding two hundred dollars.

4. An action commenced by attachment of property, as now provided by statute, if the debt or damages claimed do not exceed two hundred dollars.

5. An action upon bond conditioned for the payment of money, not exceeding two hundred dollars, though the penalty exceed that sum, the judgment to be given for the sum actually due. Where the payments are to be made by installments, an action may be brought for each installment as it becomes due.

6. An action upon a surety bond taken by them, though the penalty or amount claimed exceed two hundred dollars.

7. An action upon a judgment rendered in a court of justice of the peace, or by a justice, or other inferior court in a city where such action is not prohibited by section seventy-one.

8. To take and enter judgment on the confession of a defendant, where the amount confessed shall not exceed five hundred dollars, in the manner prescribed by article eight, title four, chapter two, of part three of the revised statutes.

9. An action for damages for fraud in the sale, purchase or exchange of personal property, if the damages claimed do not exceed two hundred dollars.

10. [§ 1.] An action to recover the possession of personal property claimed, the value of which, as stated in the affidavit of the plaintiff, his agent or attorney, shall not exceed the sum of one hundred dollars.

[§ 2.] The plaintiff in such action at the time of issuing the summons, but not afterward, may claim the immediate delivery of such property as hereinafter provided.

[§ 3.] Before any process shall be issued in an action to recover the possession of personal property, the plaintiff, his agent or attorney, shall make proof by affidavit, showing:

1. That the plaintiff is the owner, or entitled to immediate possession of the property claimed, particularly describing the same.
2. That such property is wrongfully withheld or detained by the defendant.
3. The cause of such detention or withholding thereof, according to the best knowledge, information and belief of the person making the affida-

vit. 4. That said personal property has not been taken for any tax, fine or assessment pursuant to statute, or seized by virtue of an execution or attachment against the property of said plaintiff; or, if so seized, that it is exempt from such seizure by statute. 5. The actual value of said personal property.

The following form will answer for the affidavit, being careful to fill it as required by the preceding section.

IN JUSTICES' COURT.

<i>against</i>	mm	}	<i>Affidavit on claim of delivery of personal property.</i>
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County, ss.

plaintiff in this action, being duly
sworn, says that the *owner* of the follow-
ing personal property claimed in this action, that is to say :

that the said property is wrongfully withheld or detained from the *plaintiff* by _____ the *defendant* herein. That the cause of the detention thereof, according to this deponent's best knowledge, information and belief, is as follows :

that the said personal property has not been taken for any tax, fine or assessment, pursuant to statute, or seized by virtue of an execution or attachment against the property of the *plaintiff*—

and that the actual value of said personal property of the *plaintiff*—

Sworn before me, this }
day of 18 . }

fore me, the undersigned Justice of the Peace, at my office,
in the said town, on the day of
187 , at o'clock in the noon, to answer the complaint
of *plaintiff* ; and if you fail to appear at the
time and place above mentioned, the *plaintiff* will have
judgment for the possession of the property described in
the affidavit, a copy of which is herewith served upon you,
with the costs and disbursements of this action.

Witness my hand the day of 187 .
Justice of the Peace.

Form of Undertaking, &c.

IN JUSTICES' COURT, before , Justice.

J. D.

against

R. V.

Whereas, the above named plaintiff has commenced an
action against the above named defendant, for the recovery
of certain personal property, mentioned and described in
the affidavit of (as case may be) made for such purpose.

Now, therefore, we, A. B., of the town of , county
of , and C. D., of the same place, do acknowledge
ourselves bound in the sum of (*double the value of the prop-
erty*) for the prosecution of the said action, for a return of
the said property to the said defendant, if return thereof be
adjudged ; and for the payment to the defendant of such
sum as may for any cause be recovered against the plaintiff
in this action.

Utica, county of , January 1, 1871. A. B.
D. C.

Form of Acknowledgment Indorsed.

County, ss: I hereby certify that on the day of Jan-
uary, 1871, before me came A. B. and D. C., to me person-
ally known to be the persons described in, and who executed
the foregoing undertaking and severally acknowledge the
execution thereof.

Justice of the Peace.

Qualification of Surety Indorsed.

County, ss: D. C., being duly sworn by me, depose and saith he is a freeholder, residing in _____, in said county, and is worth \$ _____ (*double the amount in undertaking*) over and above all debts and liabilities he owes or has incurred.

D. C.

Justice of the Peace.

Sworn to before me this _____ day of January, 1871.

Approval of Undertaking.

I hereby approve of the within undertaking as sufficient.

Dated January 1, 1871.

Justice.

[§ 5.] The constable to whom said affidavit, indorsement and summons shall be delivered shall forthwith take the property described in said affidavit, if he can find the same, and shall keep the same in his custody. He shall thereupon, without delay, serve upon said defendant a copy of such affidavit, notice and summons, by delivering the same to him personally, if he can be found in said county; if not found, to the agent of the defendant in whose possession said property shall be found; if neither can be found, by leaving such copies at the last or usual place of abode of the defendant, with some person of suitable age and discretion. And shall forthwith make a return of his proceedings thereon, and the manner of serving the same, to the justice who issued the said summons.

[§ 6.] The defendant may, at any time after such service, and at least two days before the return day of said summons, serve upon plaintiff, or upon the constable who made such service, a notice in writing that he excepts to the sureties in said bond or undertaking; and if he fail to do so, all objection thereto shall be waived.

Form of Exception to the Sureties.

IN JUSTICES' COURT, before

Justice.

A. B.

against

D. C.

B

Take notice that the defendant herein excepts to the surety of the plaintiff in the above mentioned action.

Yours, D. C., *Defendant.*

To A. B., *Plaintiff.*

Dated, January 4, 1871.

It will be observed, the foregoing exception, if served, must be served at least two days before the return day of the summons.

If such notice be served, the sureties shall justify, or the plaintiff give new sureties, on the return day of said summons, who shall then appear and justify, or said justice shall order said property delivered to defendant, and shall also render judgment for defendant's costs and disbursements.

[§ 7.] At any time before the return day of said summons the said defendant may, if he has not excepted to plaintiff's sureties, require the return of said property to him, upon giving to the plaintiff, and filing same with the justice, a written undertaking, with one or more sureties, who shall justify before said justice on the return day of said summons, to the effect that they are bound in double the value of said property, as stated in plaintiff's affidavit, for the delivery thereof to said plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against said defendant; and if such return be not required before the return day of said summons, the property shall be delivered to said plaintiff.

IN JUSTICES' COURT, before

, Justice.

A. B.

against

D. C.

Whereas, the above named defendant has required (*or is about to require*) the return to him of the personal property taken by G. H., one of the constables of said county of to-wit, (here state the property), being certain personal property mentioned and described in the affidavit of made in this action.

Now, therefore, we, _____, of the town of _____, in the county of _____, and _____, of the same place, do acknowledge ourselves bound in the sum of (*double the value*) for the delivery of the said property to the plaintiff, if delivery thereof be adjudged, and for the payment to the plaintiff of such sum as may for any cause be recovered against the defendant in this action.

C. D.

G. H.

Dated Utica, January 6, 1871.

[§ 8.] The qualification of sureties, and their justification under this act, shall be the same as provided in sections one hundred and ninety-four and one hundred and ninety-five of the Code, in respect to bail on arrest in the supreme court.

The following are sections 194 and 195 referred to in the above section :

§ 194. [169.] (Am'd, 1849.) *Qualifications of bail.*

The qualifications of bail must be as follows :

1. Each of them must be a resident and householder or freeholder, within the State.

2. They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution, but the judge, or a justice of the peace, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

§ 195 [170.] (Am'd, 1849.) *Justification and allowance of bail.*

For the purpose of justification, each of the bail shall attend before the judge, or a justice of the peace, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge or justice of the peace, in his discretion may think proper. The examination shall be reduced to writing and subscribed by the bail, if required by the plaintiff.

[§ 9.] Sections two hundred and fourteen, two hundred and fifteen and two hundred and sixteen of the Code shall

apply to proceedings and actions brought under this act, substituting the word "constable" for the word "sheriff" whenever it occurs in either of said sections.

[§ 10.] The actions so commenced shall be tried in all respects as other actions are tried in justices' courts. The judgment for the plaintiff may be for the possession, or for the recovery of the possession, or the value thereof, in case a delivery cannot be had, and of damages for the detention. If the property have been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same. An execution shall be issued thereon, and if the judgment be for the delivery of the possession of personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs or damages recovered by the same judgment out of the personal property of the party against whom it was rendered, to be specified therein, if a delivery thereof cannot be had. The execution shall be returnable within sixty days after its receipt by the officer, to the justice who issued the same.

[§ 11.] In all actions for the recovery of the possession of personal property, as herein provided, if the property shall not have been delivered to plaintiff, or the defendant, by answer, shall claim a return thereof, the justice or jury shall assess the value thereof, and the injury sustained by the prevailing party by reason of the taking or detention thereof, and the justice shall render judgment accordingly, with costs and disbursements.

[§ 12.] If it shall appear by the return of a constable that he had taken the property described in the plaintiff's affidavit, and that defendant cannot be found, and has no last place of abode in said county, or that no agent of defendant could be found on whom service could be made, the justice may proceed with the cause in the same manner as though there had been a personal service.

[§ 13.] For the indorsement on said affidavit, the justice shall receive an additional fee of twenty-five cents, which shall be included in the costs of the suit.

The sections referred to in the preceding 9th section read as follows :

§ 214. [189.] *Property; how taken, when concealed in building or inclosure.*

If the property or any part thereof be concealed in a building or inclosure, the sheriff shall publicly demand its delivery. If it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession ; and, if necessary, he may call to his aid the power of his county.

§ 215. [190.] *Property; how kept.*

When the sheriff shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

§ 216. *Claim of property by third person.*

If the property taken be claimed by any other person than the defendant or his agent, and such person shall make affidavit of his title thereto, and right to the possession thereof, stating the grounds of such right and title, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, shall indemnify the sheriff against such claim by an undertaking, executed by two sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property as specified in the affidavit of the plaintiff, and freeholders and householders of the county. And no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff unless made as aforesaid, and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity.

In Henry S. Dennis, Receiver, &c.,

against

Louis Baron, *and*

Annin Doubleday

against

John Dyer.

Both decided at the March term, 1870, in court of appeals, it is held that the affidavit of the plaintiff or his agent, stating the value of the property taken to be \$100, controlled and was legal, although it appeared on the trial the property was worth much more than \$100, yet the proceedings were regular and the justice had jurisdiction, (42d N. Y.)

§ 54. [47.] *Jurisdiction in civil actions limited.*

But no justice of the peace shall have cognizance of a civil action.

1. In which the people of this state are a party, excepting for penalties not exceeding one hundred dollars.

2. Nor where the title to real property shall come in question, as provided by sections 55 to 62, both inclusive.

3. Nor of a civil action for an assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction.

4. Nor of a matter of account, where the sum total of the accounts of both parties, proved to the satisfaction of the justice, shall exceed four hundred dollars.

5. Nor of an action against an executor or administrator, as such.

§ 55. [48.] *Answer of title to land.*

In every action brought in a court of justice of the peace, where the title to real property shall come in question, the defendant may, either with or without other matter of defence, set forth in his answer any matter showing that such title will come in question. Such answer shall be in writing, signed by the defendant or his attorney, and delivered to the justice. The justice shall thereupon countersign the same and deliver it to the plaintiff.

§ 56. [49.] (Am'd, 1851, 1858.) *Undertaking therein.*

At the time of answering, the defendant shall deliver to

the justice a written undertaking, executed by at least one sufficient surety and approved by the justice, to the effect, that, if the plaintiff shall within twenty days thereafter deposit with the justice a summons and complaint in an action in the supreme court for the same cause, the defendant will, within twenty days after such deposit, give an admission in writing of the service thereof.

Where the defendant was arrested in the action before the justice, the undertaking shall further provide, that he will at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein. In case of failure to comply with the undertaking, the surety shall be liable, not exceeding one hundred dollars.

§ 57. [50.] (Am'd, 1851, 1858.) *Suit before justice to be discontinued.*

Upon the delivery of the undertaking to the justice, the action before him shall be discontinued, and each party shall pay his own costs. The costs so paid by either party shall be allowed to him, if he recover costs in the action to be brought for the same cause in the supreme court. If no such action be brought within thirty days after the delivery of the undertaking, the defendant's costs before the justice may be recovered of the plaintiff.

§ 58. [51.] *Proceedings if undertaking not given.*

If the undertaking be not delivered to the justice, he shall have jurisdiction of the cause, and shall proceed therein ; and the defendant shall be precluded in his defence from drawing the title in question.

§ 59. [52.] *The same.*

If, however, it appear on the trial, from the plaintiff's own showing, that the title to real property is in question, and such title shall be disputed by the defendant, the justice shall dismiss the action, and render judgment against the plaintiff for the costs.

§ 60. [53.] (Am'd, 1851, 1858.) *New action in supreme court, pleadings therein.*

When a suit before a justice shall be discontinued by the delivery of an answer and undertaking, as provided in sections fifty-five, fifty-six and fifty-seven, the plaintiff may prosecute an action for the same cause, in the supreme court, and shall complain for the same cause of action only on which he relied before the justice; and the answer of the defendant shall set up the same defence only which he made before the justice.

‘ § 61. [54.] (Am'd, 1851, 1858.) *Costs of action in supreme court.*

If the judgment in the supreme court be for the plaintiff, he shall recover costs; if it be for the defendant, he shall recover costs, except that upon a verdict he shall pay costs to the plaintiff, unless the judge certify that the title to real property came in question on the trial. See *post*, §§ 274, 304.

§ 62. [55.] (Am'd, 1849, 1851, 1858, 1860.) *Proceedings when several causes of action and answer of title as to one.*

If, in an action before a justice, the plaintiff have several causes of action, to one of which the defence of title to real property shall be interposed, and as to such cause, the defendant shall answer and deliver an undertaking, as provided in sections fifty-five and fifty-six, the justice shall discontinue the proceedings as to that cause, and the plaintiff may commence another action therefor in the supreme court. As to the other causes of action the justice may continue his proceedings.

All actions pending in any county court, on the seventh day of May, eighteen hundred and fifty-eight, in all cases in which a plea of title was interposed in actions originally commenced in a justices' court, are transferred to and vested in the supreme court, with full power and jurisdiction to proceed therein as if commenced in said supreme court, by reason of a plea of title having been interposed in a justices' court in like cases.

§ 63. [56.] (Am'd, 1849.) *Docketing justices' judgments, and effect thereof.*

A justice of the peace, on the demand of a party in whose

favor he shall have rendered a judgment, shall give a transcript thereof, which may be filed and docketed in the office of the clerk of the county where the judgment was rendered.

The time of the receipt of the transcript by the clerk shall be noted thereon and entered in the docket; and, from that time, the judgment shall be a judgment of the county court. A certified transcript of such judgment may be filed and docketed in the clerk's office of any other county, and with the like effect, in every respect, as in the county where the judgment was rendered; except that it shall be a lien only from the time of filing and docketing the transcript. But no such judgment for a less sum than twenty-five dollars, exclusive of costs, hereafter docketed, shall be a lien upon or enforced against real property. See section 64, subdivision 13.

§ 64. [57.] (Am'd, 1849, 1851, 1852, 1860, 1867, 1869, 1870.) *Rules in justices' courts.*

The following rules shall be observed in the courts of justices of the peace:

1. The pleadings in these courts are :
 1. The complaint by the plaintiff.
 2. The answer by the defendant.
2. The pleadings may be oral, or in writing; if oral, the substance of them shall be entered by the justice in his docket; if in writing, they shall be filed by him, and a reference to them shall be made in the docket.
3. The complaint shall state, in a plain and direct manner, the facts constituting the cause of action.
4. The answer may contain a denial of the complaint, or of any part thereof, and also notice in a plain and direct manner of any facts constituting a defence or counterclaim.
5. Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended.
6. Either party may demur to a pleading of his adversary, or any part thereof, when it is not sufficiently explicit to enable him to understand it, or it contains no cause of action or defence, although it be taken as true.
7. If the court deem the objection well founded, it shall

order the pleading to be amended, and if the party refuse to amend, the defective pleading shall be disregarded.

8. In case a defendant does not appear and answer, the plaintiff cannot recover, without proving his case.

9. In an action or defence, founded upon an account or an instrument for the payment of money only, it shall be sufficient for a party to deliver the account or instrument to the court, and to state that there is due to him thereon from the adverse party a specified sum, which he claims to recover or set off.

10. A variance between the proof on the trial and the allegations in a pleading shall be disregarded as immaterial, unless the court shall be satisfied that the adverse party has been misled to his prejudice thereby.

11. The pleadings may be amended at any time before the trial, or during the trial, or upon appeal, when by such amendment substantial justice will be promoted. If the amendment be made after the joining of the issue, and it be made to appear to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment shall be granted. The court may also, in its discretion, require, as a condition of an amendment, the payment of costs to the adverse party.

12. Execution may be issued on a judgment, heretofore or hereafter rendered in a justices' court, at any time within five years after the rendition thereof, and shall be returnable sixty days from the date of the same.

13. If the judgment be docketed with the county clerk, the execution shall be issued by him to the sheriff of the county, and have the same effect, and be executed in the same manner, as other executions and judgments of the county court, except as provided in section sixty-three.

14. The court may, at the joining of issue, require either party, at the request of the other, at that or some other specified time, to exhibit his account on demand, or state the nature thereof as far forth as may be in his power, and, in case of his default, preclude him from giving evidence

of such parts thereof as shall not have been so exhibited or stated.

15. The provisions of this act, respecting forms of action, parties to actions, the rules of evidence, the times of commencing actions, and the service of process upon corporations, shall apply to these courts.

The defendant may, on the return of process, and before answering, make an offer in writing to allow judgment to be taken against him for an amount to be stated in such offer, with costs. The plaintiff shall thereupon, and before any other proceedings shall be had in the action, determine whether he will accept or reject such offer. If he accept the offer, and gives notice thereof in writing, the justice shall file the offer and the acceptance thereof, and render judgment accordingly. If notice of acceptance be not given, and if the plaintiff fail to obtain judgment for a greater amount, exclusive of costs, than has been specified in the offer, he shall not recover costs, but shall pay to the defendant his costs accruing subsequent to the offer.

Form of Offer.

IN JUSTICES' COURT, before

Justice.

A. B.

against

C. D. The defendant in this action hereby offers to allow judgment to be taken against him for the sum of \$ [state precise amount] with costs.

Dated 1871.

C. D., *Defendant.*

To A. B. *Plaintiff.*

It will be observed the offer must be made before any answer is interposed or it will be too late.

Form of Acceptance.

IN JUSTICES' COURT, before

Justice.

A. B.

against

C. D. The plaintiff in this action hereby accepts the

offer of the defendant to allow judgment to be taken against him for the sum of \$, with costs.

Dated 187 A. B. *Plaintiff*.

To C. D. *Defendant*.

The acceptance must be made at once, if at all, before the defendant answers.

TITLE VII.

Of justices' and other inferior courts in cities.

- CHAPTER I. The marine court of the city of New York.
 II. The justices' courts in the city of New York.
 III. The justices' courts of cities.
 IV. General provisions.

CHAPTER I.

The marine court of the city of New York.

§ 65. [58.] *Its jurisdiction.*

This section has been entirely abrogated by subsequent laws. As to the origin, powers, etc., of this court, see laws of 1813, ch. 86, § 85, etc.; 1819, ch. 71; 1844, ch. 148, 1849, ch. 144; id. 377; 1852, ch. 389; 1853, ch. 529, id. 617; 1857, ch. 295; 1858, ch. 334; 1862, ch. 484; 1865, ch. 436; 1866, ch. 701; 1867, ch. 784.

CHAPTER II.

Justices' courts in the city of New York.

§ 66. [59.] (Am'd, 1870.) *Their jurisdiction.*

The district courts of the city of New York shall have such jurisdiction as is provided by special statutes; and proceedings under article two, of title ten, of chapter eight, of part three of the revised statutes, may be had before any justice of such courts, without regard to the district in which the premises are situated, and the affidavits used in such proceedings may be taken before any officer authorized by law to take affidavits.

And the justices of the district courts of the city of New York are hereby respectively authorized to appoint a stenographer in their several courts, whose duty it shall be to take full stenographic notes of all proceedings in trials had therein. He shall hold his office during the pleasure of the justice of the court, and shall receive a salary of two thousand dollars per annum out of the city treasury.

The clerks of the said district courts shall collect, in all cases in which a trial is had, the sum of one dollar, in addition to the other fees authorized by law, and shall pay the same into the city treasury, in like manner with other fees collected by them.

CHAPTER III.

The justices' courts of cities.

§ 67. [60.] *Their jurisdiction.*

The justices' courts of cities shall have jurisdiction in the following cases, and no other :

1. In actions similar to those in which justices of the peace have jurisdiction, as provided by sections fifty-three and fifty-four.

2. In an action upon the charter or by-laws of the corporations of their respective cities, where the penalty or forfeiture shall not exceed one hundred dollars.

CHAPTER IV.

General provisions.

§ 68. [61.] (Am'd, 1849, 1851.) *Sections 55 to 64 applicable to the courts embraced in this title.*

The provisions of sections fifty-five to sixty-four, both inclusive, relating to forms of action, to pleadings, to the times of commencing actions, to the rules of evidence, to filing and docketing transcripts of judgment, to their effect, and the mode of enforcing them, and to proceedings where title to real property shall come in question, shall apply to the courts embraced in this title ; except that after

the discontinuance of the actions in the inferior court upon an answer of title, the new action may be brought either in the supreme court, or in any other court having jurisdiction thereof, and except also that in the city and county of New York, a judgment for twenty-five dollars or over, exclusive of costs, the transcript whereof is docketed in the office of the clerk of that county, shall have the same effect as a lien, and be enforced in the same manner as and be deemed a judgment of the court of common pleas for the city and county of New York.

II. Of the Form of Civil Actions.

The following sections of the Code are made applicable to Justices' Courts:

SECTION 69. Distinctions between actions at law and suits in equity, and forms of such actions and suits, abolished.

70. Parties to an action, how designated.

71. Actions on judgments, when and how to be brought.

72. Feigned issues abolished, and order for trial substituted.

§ 69. The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action.

§ 70. In such action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

§ 71. No action shall be brought upon a judgment rendered in any court of this state, except a court of a justice of the peace, between the same parties, without leave of the court for good cause shown, on notice to the adverse party; and no action on a judgment rendered by a justice of the peace, shall be brought in the same county within five years after its rendition, except in case of his death, resignation, incapacity to act, or removal from the county, or that the process was not personally served on the defendant, or on all the defendants, or in case of the death of some of the parties.

or where the docket or record of such judgment is or shall have been lost or destroyed.

§ 72. Feigned issues are abolished; and instead thereof, in the cases where the power now exists to order a feigned issue, or when a question of fact, not put in issue by the pleadings, is to be tried by a jury, an order for the trial may be made, stating, distinctly and plainly, the question of fact to be tried, and such order shall be, the only authority necessary for a trial.

It should be observed here that although the above sections apply to justices' courts, yet the law is not thereby changed in respect to the jurisdiction of these courts, except such changes as are made by the fifty-second and fifty-third sections of the Code.

In Webster agt. Hopkins, (11 How. Pr. R. 147) Bacon J. says: The utmost extent to which the general provisions of the Code, in reference to actions, and the parties to actions thereto, &c., have been made applicable to proceedings in justices' courts, will be found in the fifteenth subdivision of the sixty-fourth section of the Code, which enacts that, "the provisions of this act (the Code) respecting forms of action," "parties to actions," "the rules of evidence," "the times of commencing actions," and "the service of process upon corporations," shall apply to these courts. These all point to specific provisions of the Code on those particular subjects, and necessarily exclude from the action of these tribunals, those sections inconsistent with their "powers and duties."

In the case of Gates agt. Ward, (17 Barb. S. C. R. 424,) the justice, on the return of the summons, amended the process so as to drop the name of one of the plaintiffs, and the cause was then ajourned.

On the adjourned day, the plaintiff moved to restore the name which had been dropped, and also to amend the complaint by entitling in the name of both plaintiffs, and this motion was granted, and the cause was tried, and resulted in a verdict for the plaintiff. The county court affirmed the judgment, but on appeal, the supreme court reversed both judgments, holding that the justice had no power either to strike out the name of one of the plaintiffs and proceed in

the name of the other, nor to add new parties; and the court further say, that the rules prescribed by the Code, as to the necessary parties to an action, are applicable to justices' courts, so far as is consistent with their constitution and duties. But the authority to amend by adding parties is a different thing. It could not have been intended to give them the same general powers in this respect as is possessed by this court.

Justices of the peace have no jurisdiction of co-partnership accounts, or of suits between co-partners, unless they have settled, and had a balance struck between them, as this class of cases properly belongs to a court of equity, and it will readily be seen that in all these cases a justice has no jurisdiction.

In all cases, where a summons is not personally served on all the defendants, the judgment may be sued over at any time, as appears by the seventy-first section.

The forms of action hitherto existing in this state having been abolished by the Code of Procedure, there is now but *one form of action* for the enforcement and protection of private rights; and the redress of private wrongs, which is denominated a *civil action*.

The nature of the injury complained of and the remedy sought, must now be derived from the plain, ordinary import of the language used in the process and pleadings.

If the action be brought on a contract of any kind, *written or unwritten, sealed or unsealed*, it may be called an action *on a contract*. If for taking, detaining or injuring personal property, *an action for taking, (detaining,) or (injuring,)* personal property. If for injury to real property, *an action for injury to real property*.

Or an action for deceit and fraud in the sale of personal property.

The actions cognizable by a justice of the peace are those arising :

1. On contract, including actions on judgments rendered by courts of justices of the peace, or of justices or other inferior courts in cities.¹

¹ Code, § 153.

2. For injuries to the person, or to real property, or for taking, detaining or injuring personal property.
3. An action for a penalty given by statute.
4. Such as are prosecuted by attachments.
5. An action for damages for fraud in the sale, purchase or exchange of personal property, if the damages claimed do not exceed two hundred dollars.

On Contract.

1st. A contract is an *agreement* upon sufficient consideration to do or not to do a particular act or thing ; and all the contracts of which I shall have occasion to speak, are reducible to this definition.¹

It is an *agreement*, a mutual bargain, and therefore, there *must* be at least two contracting parties, of sufficient ability to make a contract. This contract or agreement may be express or implied ; *express*, as where the terms of the agreement are openly uttered, or put in writing and signed by the parties ; *implied*, are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform. As, if I employ a man to work for me a day, without *any* express agreement what I shall pay him, the law *implies* a promise on my part to pay him what he deserves for his labor ; and he is allowed in this action to prove what his labor was reasonably worth. So, if I buy goods of a merchant, or mechanic, without any agreement as to price, the law concludes that I contracted to pay for them what they are worth, and on the trial, *the plaintiff* may prove, 1st, that I had the goods, and 2d, what they are reasonably worth, which will entitle him to recover, unless I have some legal defence, as payment, set-off, &c.²

A contract may also be *executed* or executory :

Executed, as when I agree to pay a man fifty dollars for his wagon, to be delivered *forthwith*, in which case the right and the possession are immediately transferred to me, and the right of action accrues to him, to recover of me the price at such time as I agree to pay the fifty dollars³.

¹ Toml. L. Dict. Ti. Contract, Com. on Con. 2.

² 1 Chitty Pl. pp. 111, 112 ; 2 Kent's Com. p. 450 ; Com. on Con. ed. 1835, p. 2.

³ Kent's Com. 450 ; Com. on Con. 2 ; 1 Toml. L. Dic. Tit. Agreement 2.

Executory, as if he agree to deliver the wagon at some future day, in that case the *right* only, vests in me, not in possession, but in *action* only. A contract *executed* conveys a *chose* in possession ; a contract *executory* conveys only a *chose* in action.¹

As we have seen, the slightest consideration will support an *assumpsit*, and the least benefit to the defendant, or loss to the plaintiff is sufficient within this rule, as if I promise something in consideration of the discharge of a demand, the delivery of an instrument or other security, in procuring the enjoyment of a house, the procuring a note from the defendant to the plaintiff, in consideration that you will deliver me goods, upon which you have a lien, in some manner, or that you will assign to me an uncertain debt, &c., or that you will enter into A.'s land, which I claim, I will indemnify you, that you will do some act for the benefit of A., I will pay you a certain sum of money.²

One *promise* is a good consideration for *another*, as in cases of mutual promises to marry ; and the promise of an infant to marry is a good consideration for a corresponding promise on the part of an adult, and although infancy is a defence to an action for a breach of promise of marriage, yet an infant plaintiff may maintain the action ; so when in consideration of your promise to deliver me a cow, I promise to pay you twenty dollars, your mere promise is a good consideration for mine, though you have not performed ; but such promises must be mutual, and made at the same time, and I cannot maintain an action without showing performance, or what is equivalent to performance, on my part.³

There are many instances given, where a *moral obligation* has been held a good consideration for a promise. In pursuance of this rule, it has been determined, that where a note is given to A. for my benefit, which you purchase of A. and I afterwards promise to pay it to you, this binds me on the ground of my prior equitable obligation, and though, if one command or request another to commit a trespass, or

¹ Id. ² 2 Wend 588; 2 Hill 606 ; 1 Com. on Con. 13, 14, 15 ; 2 John. Cases 52 ; 1 Caines 45.

³ 7 Cow. 22 ; 1 Caines 583; 12 John. 190; 2 Kent's Com. 464, 3d ed.

other wrong, which is done, the law will not *imply* a promise of indemnity, yet an express promise to indemnify, either before or after, will bind.¹

And a promise founded on a moral obligation, in order to be binding, must be *express*, and not implied. So, where a plaintiff claimed a sum of money of the defendant, who denied it, but promised that if the plaintiff would swear to the correctness of the claim, he would pay it, and the plaintiff made affidavit accordingly, it was held that the making the proof or affidavit was a sufficient consideration for the promise, and that, in an action to recover the amount sworn to, the defendant would not be permitted to prove that the plaintiff had sworn falsely, or that he was mistaken.²

If one person made a promise to another for the benefit of a third person, that third person may maintain an action upon it.³

The delivery to a person of property levied upon by a sheriff or constable, or leaving it under his control, is a sufficient consideration for a promise to deliver it to the sheriff or constable.³

The owner of goods may maintain assumpsit against one who has taken them away wrongfully, and the defendant cannot set up that he took them wrongfully, as the plaintiff has the right to recover against him as for goods sold and delivered, waiving the tort, and so a promise to pay will be implied from an agreement of the parties to abide by the decision of individuals named between them, to appraise the value of certain work and services done and performed by one party for the other.⁴

On a contract to pay money by installments, or do any other act at different times, an action lies for each and every default, though the contract be a single and entire one.⁵

Where there was an entire contract by which plaintiff

¹ 14 John. 468; 2 Caines 50; 8 Page 398; 1 Camp. 345.

² 6 John. 288; 2 Kent's Com. 465; 18 John. 837.

³ 1 Cow. Tr. 3d ed. p. 83; 2d Denio 403; 5 Cow. 195.

⁴ 2 Wend. 567; 1 Cow. Tr. 84.

⁵ 2 R. S. 158, § 3; Code § 53.

agreed to furnish oil cloths and carpets, and to carpet defendants house, and he did a part of it in an unskillful and unworkmanlike manner, the defendant is at liberty to avoid the contract and return the goods. In such case, where the goods have been returned by the defendant, the plaintiff cannot recover on the contract.¹

The measure of damages against a party who has employed another to do certain mechanical work, at a price agreed upon, and who has countermanded his directions, and forbidden the further execution of the work, after it had been commenced, *is not* the whole amount agreed to be paid, but a just recompense for such injury as the party employed has sustained on account of the breach of the agreement.²

The party so employed has no right to proceed with the work after such countermand.³

Where, in a contract for the erection of a building upon the land of another, performance is to precede payment, and is the condition thereof, the builder having substantially failed to perform on his part, can recover nothing for his labor and materials, notwithstanding the owner has chosen to occupy and enjoy the erection. Mere occupation of a building in such case is not a waiver of strict performance.⁴

A. agrees to sell to B. certain lands, and convey the same to him on a day named, within ten months, and B. pays down the purchase money. A. also agrees that at the expiration of a year, if B. shall desire it, and give thirty days' notice, he will pay back the money with interest. This agreement, being signed by both parties, it seems, is not void for want of mutuality or consideration; although it contains no express engagement on the part of B. to do anything.⁵

The purchase of the same and the payment to B. of the money, constitute a sufficient consideration to sustain the engagement.

¹ Husted vs. Craig, 86 N. Y. 221; Baker vs. Higgins, 21 N. Y. 397; Smith vs. Brady, 17 N. Y. 173.

² Clark vs. Marsiglia, 1 Denio R. 317.

³ Id.

⁴ Smith vs. Brady, 17 N. Y. 173; 5 Selden, 93; 14 Barb. 174.

⁵ Eno vs. Woodworth, 4 Comstock. 209.

Where the parties deviate from the terms of a special contract to perform work and labor, in an action for the *work done*, the contract price will, so far as applicable, be the rule of damages.¹

But where the contract is terminated by the employer against the will of the contractor, the latter is not confined to the contract price of the work done, but may bring his action for a breach of the agreement, and recover, as damages, the profits he would have made, if allowed to complete the work; or he may waive the contract, and bring his action for work and labor generally, and recover what the work done is actually worth. But where the contractor *elects* to consider the contract as rescinded, and brings his action for work and labor generally, he cannot recover for the profits upon the unexecuted part of the work. In such a case, the rule of damages is the actual value of what has been done under the contract.

Where, by the terms of a contract for work and labor, the full price is not to be paid until the work is completed, and a complete performance becomes impossible, by the act of the law, the contractor may recover for the work actually done, at the full price agreed on.²

Where a party agrees to work for another for a month, and if the parties are suited with each other, that he will work during the season, or six or seven months, he is bound to determine and make his election at the end of the *month*, whether to quit or stay through the season. If he continues to work after the expiration of the month, this is presumptive evidence that he has determined to stay through the season, and he cannot afterwards leave the employers service before the end of the season, except for a cause that would be a justification for abandoning or rescinding the contract. In an action for the breach of a contract, for work and labor to be done upon a farm, evidence of damage occurring to the plaintiff's crops in consequence of the defendant's leaving his service, is inadmissible. The legal measure of damages in such cases, is the difference between the wages agreed to

¹ Clark vs. The Mayor of New York, 4 Com. 338.

² Jones vs. Judd, 4 Comstock, 411, Gardiner J.

be paid to the defendant and the price the plaintiff was obliged to pay for labor to supply his place.¹

Where one contracts to serve another for a specific time, he may leave his employer before the expiration of the time agreed upon, if sufficient cause exists to justify such leaving, and he will be permitted to recover for the time he actually served, and in some cases, beyond that. Where there is a provision in the contract, that the employee may leave in case of a disagreement, the fact of a *bona fide* disagreement is all that is necessary to entitle either party to put an end to the contract. Where one contracts with an infant to pay him for personal services, he is not at liberty, after the services have been rendered, to refuse to pay him, because at the time of contracting he was an infant without a guardian.

Where the plaintiff undertakes to perform certain work upon the house of the defendant, at a price stipulated to be paid, and the building is destroyed by fire before the work is completed, the plaintiff will be entitled to recover for the work performed up to the time of the fire.²

In such contract, by the destruction of the house without the fault of the plaintiff, the defendant is put in default upon the principle that he was bound to finish the house to enable the plaintiff to complete his contract.

Where the owner of property retains possession and contracts for the performance of work upon it, there is an implied obligation for him to have it on hand and in readiness for the labor to be performed.³

Where the defendant, when called upon to fulfill his contract with the party with whom it was made, refuses to fulfill it, and declares that he will not, and does not intend to fulfill on his part, the other party is thereby excused from a tender of performance on his part. His right of action is assignable, and his assignee may recover the damages consequent upon such breach.

A verbal agreement to purchase merchandise exceeding fifty dollars in value, and further, that an existing debt of

¹ Peters vs. Whitney, 23 Barb. 24.

² Niblo vs. Binsse, 1 Keyes, 476.

³ Sears vs. Conover, 3 Keyes, 118, and cases cited.

the seller to the purchaser should be applied as a payment upon the price, does not take the transaction out of the statute of frauds. The agreement is wholly void, the verbal understanding that the debt should be applied *in payment* not being a payment *at the time* of making the contract, within the last clause of § 3, 2 R. S. 136.¹

But where the completion of a job is arrested by the act or *omission* of the party for whom the work is done, the contractor has an election to treat the contract as rescinded, and recover on the merits, the *value* of his labor, or he may sue upon the agreement, and recover for the work *completed*, at the stipulated price, and for the loss in profits or otherwise sustained by the interruption.²

Hindrances by one party to a contract whereby the other party is prevented from completing his part of the contract by the time stipulated, afford a legal excuse for non-performance within such period.³

An objection to the offering of any excuse by the plaintiff for not performing his part of the contract within the time stipulated, is properly overruled. Where the work to be performed by the plaintiff could not be performed until other work was done by the defendant or his employees, the failure to have such preliminary work completed in season to enable the plaintiff to complete his within the time limited by the contract, is a sufficient reason or excuse for the plaintiff for not completing the work within the time prescribed.

All agreements by which one person engages to pay another for his aid or influence in procuring an appointment to office, it seems, are illegal and void, and every new agreement entered into for the purpose of carrying into effect any of the unexecuted provisions of a previous illegal contract, is void.⁴

A contract, the consideration of which is that one of the parties thereto would give all the aid in his power, spend

¹ Mattice vs. Allen, 3 Keyes, 492.

² Id; 7 Hill, 71, 73; 2 Wend. 346; 22 Pickering, 384; 1 Comstock, 321.

³ Stewart & Howell vs. Ketellas, 36 N. Y. 388, and cases cited.

⁴ Gray vs. Hook, 4 Comstock. 449; this case in 6 Barbour, 398, reversed.

such reasonable time as may be necessary, and generally use his utmost influence and exertions to procure the passage into a law of a bill introduced into the legislature, is void as against public policy, and will not be enforced. Such contracts tend to subject the legislature to secret, improper and corrupt influences.¹

The defendant, who owned a flouring and custom mill, contracted to "take" the wheat of the plaintiffs which was to be of good mercantile quality, and to give them one barrel of superfine flour at his mill, for every four 36-60ths bushels. He was to pack the flour in first-rate barrels, and warrant it to pass inspection, one-half the flour to be delivered on a given day, and the other half on a given day later, or as much sooner as he could make it.²

Held, that the contract imported a sale of the wheat and not a bailment, and therefore, further held, that the accidental destruction of the mill and the wheat after it was received into the mill, did not excuse the defendant from delivering the flour.

Two principles reiterated as well settled, first, that in a contract between A. and B., wherein B. agrees to pay money to C., the latter may maintain an action against B. to recover the money. Secondly, that where land is conveyed, subject to a mortgage, without express agreement to pay, no action involving personal liability can be maintained by the mortgagee against the buyer.³

Every description of contract is vitiated by fraud or deceit of one of the parties, and contracts so vitiated may be avoided by the party imposed upon. The basis of all dealings is good faith, and each party contracting has a right to insist that the other shall neither state to him any falsehood in relation to the subject matter of it, nor conceal any secret defect, with a view to obtain an advantage. Thus, if one in making a sale to another, conceal a secret defect in the article from the purchaser, he may, if he discover it

¹ Mills vs. Mills, 40 N. Y. 543; 36 N. Y. 235.

² Norton vs. Woodruff, 2 Comstock, 153, Gardiner J.

³ Durgelstein vs. 3d Av. R. R., 37 N. Y. 575, Hunt, Ch. J.; Belmont vs. Corman, 22 N. Y. 438.

before the delivery, refuse to carry the contract into effect, and if afterwards, may return the article, regard the sale void, and recover the price paid in an action against the vendor.¹ It will make no difference if the party deceived was led by the deceit to agree to run his own risk as to the quality of the article, or other subject of the contract; the fraud or deceit practiced will avoid it.²

If the fraud or deceit were committed by the agent of the contracting party, the latter will be bound by it in the same manner as if he committed it himself. Thus, where an agent to sell a picture, knowingly suffered the purchaser to be deceived in relation to a fact which would have influenced his opinion of its value, as whether it was made by a particular artist, the contract was held void.³

The concealment of any fact which the contractor is in good faith bound to communicate, is of itself a fraud. So is any misrepresentation by which a party is misled, and this may be by acts or signs, or even by silence as well as by word. And where a material misrepresentation is made, although inadvertently, or through mistake or ignorance, it is considered a constructive fraud, because its effect was to deceive.⁴ The misrepresentation, however, must be in regard to a material fact operating as an inducement to the contract, and if it is the concealment of a fact, one which it was the duty of the party in good faith to disclose.⁵

Within the principle of the rule laid down in the last paragraph, a vendor, in negotiating a sale of property, must not conceal any secret defect in it, nor employ any artifice to disguise it. He is not, however, bound to enumerate all the defects of the article to be sold. The vendor must rely upon his own judgment, and purchase at his own risk, and if he is negligent in making the purchase, it should not therefore be avoided. The law simply protects him against unfairness and fraud, and will only relieve him

¹ 23 Wend. 350; 2 Hill, 288.

² 6 John. 110; 12 Id. 469.

³ 4 Term 39; 1 Id. 12; 1 Stark. 484.

⁴ 3 Bl. Com. 166; 1 Story Eq. 202; 9 Vesey, 21; 2 Bro. C. C. 389; 6 Bing. 396.

⁵ Story on Contracts, §§ 171, 172, 178.

from the contract when he was deceived and actually misled. If he, at the time, knew the statements or representations made to him to be false, he could not have been misled by them, and the contract would be valid, notwithstanding their falsity.¹

Where one purchased goods on credit, obtained by fraudulent representations, the vendor may reclaim his goods from the vendee or any one to whom he has transferred them, except a purchaser in good faith and for value,² or he may recover their value in an action brought immediately and without regard to the credit agreed to be given.³ If, however, he have received from the fraudulent purchaser, a note, he must first offer to return it, or assign any judgment he had obtained thereon.⁴

The expression sometimes used in the books that when a sale is procured by fraud and misrepresentation, no title passes to the vendee, must be taken with due qualification. The sale is not absolutely void, but only voidable at the option of the vendor.

There can be no doubt of the soundness of the principle, that the vendee himself acquires no property in, or title to the goods, and cannot retain them against the vendor, if he (the vendee) obtained them by fraud, practiced on the vendor, under color of a purchase, whether on credit or otherwise.

It is not competent to the person guilty of the fraud on the other party to the agreement to avoid the contract on this ground. The election is left solely to the party defrauded. The election on the part of the defrauded party to rescind the contract, must be exercised as soon as the fraud is discovered. And if, after the fraud practiced on him has come to his knowledge, he deals with the subject matter of the contract, he cannot repudiate the contract, although he subsequently discover further circumstances connected with the same fraud.

¹ Story on Contracts, §§ 172 to 177.

² 23 John. 235; 20 Wend. 167, 267; 18 Id. 570; 1 Hill, 311; 3 Barb. Ch. 451.

³ 6 John. 110.

⁴ 2 Denio, 136.

In order to establish fraud in the purchase of goods, it is not necessary that the purchaser should have made false statements concerning his pecuniary ability, by which the credit was obtained. The fraud consists in the purchase with intent not to pay, and this intent may be proved by facts and circumstances, as well as by the affirmative declarations of the purchaser, as to his pecuniary condition.¹

When a sale is procured by fraud, no title passes to the vendee. The vendor still retains the legal right to the goods, unless, after discovering the fraud, he assents to, and ratifies the act of sale positively, or by such delay in reclaiming the goods as would authorize a jury to infer assent. (*Ash v. Putnam*, 1 Hill, 302.) A sale, therefore, under circumstances of fraud, is not absolutely void. The party defrauded may or may not avoid the sale at his option. If he designs to rescind the contract, he must do whatever may be necessary to restore the parties to the condition in which they were at the time of the sale, in respect to the thing sold and the consideration paid. If he has received anything under the contract, he must restore, or offer to restore it, for he cannot rescind in part, and affirm as to the residue. (*Voorhees and others v. Earl & Kellogg*, 2 Hill, 288.) The party who would disaffirm a fraudulent contract must return whatever he has received upon it. This is on a plain and just principle. He cannot hold on to such part of the contract as may be desirable on his part, and avoid the residue, but must rescind in toto, if at all. (*Masson v. Bovet*, 1 Denio, 74.) Thus, in *Baker v. Robbins*, (2 Denio, 138,) it was held that if the plaintiff had been defrauded in regard to the notes, he had an undoubted right to avoid his agreement to receive them in part payment. But in order to do this, he was bound to return, or offer to return, what he had received on the contract; and until this was done, the agreement upon which the notes were transferred remained in full force. At the trial, the plaintiff produced and offered to cancel the notes; but this came far short of such rescission of the contract as entitled it to a restoration of the property.²

¹ *Johnson vs. Morrell*, 2 Keyes, 655, and cases cited.

[Id. 652.

² 3 Kernan, 322; 13 Barb. S. C. R. 461; 20 Id. 253, 493; 21 Id. 535; 22

Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him as the basis of a mutual engagement, and he is under no obligation to investigate and verify statements to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith.¹

The endowment of a literary institution is not a sufficient consideration to uphold a subscription to a fund designed for that object. And although there is annexed to the subscription a condition that the subscribers are not to be bound unless a given amount shall be raised, no request can be implied therefrom against the subscribers, that the institution shall perform the services and incur the expenses necessary to fill up the subscription accordingly; where the defendant subscribed eight hundred dollars to a fund for the payment of the salaries of the officers of Hamilton College, and a condition was annexed that the subscribers were not to be bound unless the aggregate amount of subscriptions and conditions should be fifty thousand dollars.²

Held, that there was no consideration for the undertaking, and that no action would lie upon it, although there was evidence tending to show that the whole amount had been subscribed or contributed according to the terms of the condition.

It is not necessary that a consideration should exist at the time a promise is made. Thus, if one party promise another to pay him a certain sum of money if he will do a particular act, and the latter does the act before the *revocation* of the promise, the promise thereupon becomes binding, although the promisee does not at the time engage to do the act. In such a case the doing the act is a good consideration for the previous promise, and the promise amounts to a request to do the act.³

A memorandum acknowledging the receipt of a specified

¹ Mead v. Bunn, 32 N. Y. 275, Porter J.

² Trustees of Hamilton College vs. Stewart, 1 Comstock, 581, Gardiner J.

³ 9 Barbour, 202, and cases cited, Paige J.; 20 John. 89; 7 John. 122; 6 Pickering. 427.

number of barrels of apples "in store," to be forwarded to New York, at so much per barrel, is a *contract* between the parties, and the general rule is therefore applicable that parol evidence cannot be received to add to, or vary its terms; all oral stipulations between the parties preceding or accompanying the execution of such an agreement, are to be regarded as merged in it, and the receipt is to be treated as the exclusive medium of ascertaining the agreement entered into by the parties. There, a distinction exists between a mere receipt acknowledging money paid, and a receipt containing an agreement, condition or stipulation between the parties. The latter is in the nature of a contract, and cannot be varied by parol evidence.¹

A parol lease of lands for the term of one year, to commence at a period *subsequent* to the day when the contract is made, is valid under our statutes. The provisions of the second section of the title of the *Revised Statutes*, in reference to fraudulent conveyances and contracts, in relation to goods and chattels and things in action, have no application to contracts concerning lands, or any interest therein.^{2 *}

As a general rule the store of the merchant, the shop of the mechanic or manufacturer, and the farm or granary of the farmer, at which commodities sold are deposited or kept is the place of delivery, when the contract is silent as to the place. But this rule ceases to be applicable when the collateral circumstances indicate a different place.³

Where an action against a party for a forfeiture of a contract executed in duplicate, the copies produced by the respective parties, vary in their phraseology, the Court will follow the copy which is in the defendant's hands and by which he was governed in making his payments, &c.⁴

A mutual promise amounts to a sufficient consideration, provided the promises be concurrent in point of time, and

¹ Niles vs. Culver, 8 Barbour, 205, Parker J.; 1 Cow. & Hill, 423, and cases cited; 9 John: 310.

² Young vs. Drake, 1 Selden, 463.

³ Bronson vs. Gleason, 7 Barbour, 572; Gridley J.

⁴ Judd vs. Ensign, 7 Barbour, 258.

NOTE.—This case overrules the case of *Croswell vs. Crane*, (7 Barb. 192.)

in that case, the one promise is a good consideration for the other.¹

Where several persons subscribe to raise money for an object in which all feel an interest, the mutual promises of the subscribers form a valid consideration for the promise of each. But the agreement of a single person, to make a donation to a public institution without any undertaking on the part of the donor to do anything, is without consideration and void.

All contracts, therefore, to be valid, must be founded upon some legal consideration, must be such as will bind both contracting parties. If, therefore, the contract grows immediately out of, or is connected with, an illegal or immoral act, a court of justice will not enforce it.²

Where a contract is entered into for *fraudulent* or *illegal* purposes, the law refuses its aid to enable either party to disturb such parts of it as have been *executed* or carried into effect, and as to such parts as remain *executory* it will not compel the contractor to perform his engagements or pay damages for non-performance; thus, in both cases, leaving the parties where it finds them, accordingly it was *held* that a plaintiff chargeable with notice, was not entitled to recover in an action on a promissory note given in part consideration of a fraudulent conveyance of land.³

Money having been placed in the hands of an individual as a mere depositary for the use of another, may be recovered by the latter, whether it was paid to the depositary on a legal or an illegal contract. The liability of the depositary arises upon the receipt of the money, and is entirely separate from and independent of any illegal contract.⁴

Matters of Account.

Matters of account are such demands as arise in the various dealings among men, and where, from the nature of the transaction, the law will imply an undertaking on the

¹ 2 Denio, 416, 417.

² 2 Kent, 465; *Nellis vs. Clark*, 20 Wend 24.

³ 20 Wend. 24, and many cases cited.

⁴ *Woodworth vs. Bennett*, 53 Barb. 361.

part of the person indebted, to pay such a sum as is justly found due, according to the *evidence* introduced upon the trial. These demands arise in a variety of cases, among which are the following :

For goods sold and delivered.—If goods are sold and delivered to a person, although no specific amount be agreed upon, the law will imply an obligation on his part to pay what they are reasonably worth, and where goods are sold and delivered under and by virtue of a special agreement, which agreement has been fully performed, the plaintiff may nevertheless recover under the general count for goods sold and delivered, nothing remaining to be done but the payment of the money.¹

Where a defendant, by fraud, induced the plaintiff to sell goods to a third person, who was insolvent, and then got the goods into his possession, it was held he was liable upon the common count for goods sold and delivered.¹

Where one has unlawfully taken possession of another's property, the tort may be waived and an action brought for its value as for goods sold, and such a cause of action is assignable.²

It may be brought whenever any personal property has been sold, either at a price agreed upon or left to be implied by the law at what it is reasonably worth. The action may be where the defendant has received the goods by an actual delivery or its equivalent, or where he has simply contracted to purchase and refused to take and pay for them. In either case, the plaintiff may recover the value of the goods sold, and in the latter case, he may retain them in his possession as a pledge until he obtains satisfaction of his judgment, either by sale of them upon his execution against the purchaser, or in some other manner.³

Where the goods were sold and *delivered* to the defendant, the fact should, with the bargain of sale, be alleged in the complaint. If, however, the defendant has refused to receive and pay for the goods, and they have not been delivered, the contract of sale should be stated, and the fact

¹ 11 Wend. 477; 12 East. 1; 4 Cow. 564.

² Hawk vs. Thorn, 54 Barb. 164.

³ 1 Chitty Pl. 379, 380.

that the plaintiff had offered to deliver, and the defendant had refused to receive and pay for them.¹

An action may be brought as well by the purchaser as by the vendor, if the latter fail to comply with his contract of sale by delivering the goods. In this case the purchaser is entitled to recover from the vendor the difference between the contract price and that which similar goods were worth on the day when they were to have been delivered. It will not change the rule of damages if it appear that the purchaser had agreed to sell them at a price above the market, and lost the opportunity of making a profit thereby.²

For Work and Labor.—If one person perform services for another, at the request of the latter, an action will lie to recover the compensation agreed upon; or if there be no specific agreement as to the compensation, the reasonable worth of the services may be recovered, and the plaintiff will be permitted to show on the trial—1st, that he performed the services; and 2d, what those services were worth. A *request* to perform the services must be either expressly proved, or reasonably implied from the situation of the parties, or the circumstances of the case.³

Where labor and services are performed for a person with his *knowledge and assent*, there would be a strong presumption that they were performed at his request; the Court or Jury are the proper judges, from all the facts and circumstances introduced, whether they were performed at his request either express or implied.

If a laborer hire himself to work a stated length of time, and, without the consent of his employer, leave his service before the expiration of the time agreed upon, he cannot recover for the labor performed under the agreement.⁴

If, however, his employer discharge him without good cause, or abuse him in such a manner as renders it unsafe or improper to live with him longer, he is permitted to recover for his services, under the general count for labor and services done and performed, or he may recover damages for the breach of the agreement on the part of the employer,

¹ 11 John. 178.

² 24 Wend. 322.

³ 10 John. 249; 12 John. 352.

⁴ 12 John. 165; 8 Cow. 63.

the law having bound him on his part—1st, to give the laborer employ during the time he so hired to him, and 2d, to use him in a proper and becoming manner during that time.

If, however, there be a special agreement to do a piece of work, and the work be completed, but not according to such agreement, the party may nevertheless recover for labor and services rendered.

And in all cases where delay is caused by the willful acts or omissions of the party for whom the work is done, with intent to embarrass the performance of the contract by the other party, who, notwithstanding, proceeds and bestows his time and labor in attempting to complete it, until in despair he finally abandons the work, the rule that the special contract must control the rate of compensation no longer prevails, and the party is entitled to the actual value of his services.¹

If a builder contract to build a house of specified dimensions and with specified materials, and deviate from the specification, he cannot recover ; but where one not a builder finishes work differently from the specification and the employer accepts it, he may recover the contract price, deducting such a sum as it would require to complete it according to the specification. The reason of this distinction is, that in the latter case the work is accepted by the employer, while in the former it is not, although from necessity the house remains on his land, and he derives some benefit from it. But as he agreed for a particular kind of building, it would be manifestly wrong to compel him to pay for a different one merely because it occupies his land. In the case of an article other than a building, he need not accept it ; but if he chooses to receive it, reason and justice require that he should pay for it. In the case of a building, he is compelled against his will to take what he did not contract for and does not want, and it is equally just that he should not be compelled to pay for it.

Where one has ordered a carriage or other chattel to be

¹ 16 Wend. 586; 4 Cow. 564.

made for him by a mechanic, and it is made pursuant to the order, and on being tendered to him, he refuses to accept and pay for it, it may be left in charge of a third person with notice to the customer, and an action maintained for the price or it may be sold for the best price it will bring, and an action be brought for the loss upon the sale.¹

Where the owner of a lot employed a mason to work for him on a building at stipulated prices, and after a portion of the work was done, upon the owner neglecting to furnish the necessary materials, the mason quit the job, it was held that he could only recover for the labor performed after the contract price, in the absence of proof of circumstances to show greater damages; but that if by the neglect of the owner to furnish the materials, the contractor was compelled to do his work at a less favorable season, or at an increased expense, such additional expense ought to be taken into consideration and added to the contract price.² *

Where one contracts to do certain work by a given time, but not to do a portion of it until directed by his employer, the employer cannot suspend the work so long as to prevent its completion within the time agreed upon. If he does, and then directs the work to be performed, the contractor is not limited by the contract price, but can recover upon the implied agreement to pay what the work so performed is worth.³ So, if there be a special agreement, whether sealed, in writing or oral, to do a piece of work, and it be done with the assent of the employer although not pursuant to it, either in point of time or other respects, the contractor can recover what the work was reasonably worth. The employer, by permitting the contractor to proceed and finish it after the time limited has expired, waives all right to object on that ground, and the law implies a promise on his part to pay for it.⁴ And if an employer accepts work partly done he can thereafter claim a deduction only for the part not done.⁵

Where labor is performed under a special agreement

¹ 15 Wend. 497.

² 7 Wend. 121.

³ 4 Wend. 285.

⁴ 18 John. 94; 4 Cow. 285

⁵ 25 Wend. 665.

which remains in force, the action must be brought upon that, and the recovery will be had pursuant to its provisions.¹ And in such cases the contract must be produced or accounted for.² But if while the contractor is performing his special contract the employer gives a separate order to do more or different work upon it, the value of that is not to be measured by the special contract, but there is an implied promise to pay what it is reasonably worth.³ If the employer, after a portion of the work is completed, prevents the contractor from finishing it pursuant to the contract, the contractor will recover his damages for the violation of the contract by the employer, and not the simple value of the services already rendered.⁴

Where a contractor puts into an article better materials than he is required by his contract, he cannot on that account recover more than the stipulated price, nor after delivery of the article, require it to be returned because the buyer will not pay an increased price for it.⁵ So, where work is undertaken at a given price, the employer is not liable to pay a greater sum by consenting to alterations from the original plan, unless he is either expressly informed or must necessarily, from the nature of the work, be aware that the alteration will increase the expense.

Where A. repaired premises held by B. under a lease containing a covenant to repair, on a parol promise by B. to assign the lease to A., upon his refusing to assign to A., an implied promise to pay A. for the repairs was held.⁶ So, where A. by a fraudulent representation of being the owner of land induces B. to bestow labor upon it in the expectation of enjoying the property as joint owner, B. may, upon discovering the fraud, abandon the contract upon which his labor was performed, and recover for its value on an implied promise to pay for it. And in such a case it is no objection that the contract was for an interest in lands and void by the statute of frauds for not being in writing.⁷

¹ 12 John. 274; 13 id. 94.

³ 1 Mood & Malk. 413.

⁵ 3 Car. & Payne, 453.

⁷ 16 Wend. 25.

² 24 Wend. 60; 1 Sand. 206.

⁴ 4 Cranch. 564.

⁶ Ry & Mood. 420.

But where I contract with you to sell me land, and I enter upon it and improve it, and you refuse to convey, whereby the contract is rescinded, I cannot recover for my labor expended upon that land.¹ Nor can I, if I enter upon another's land without his consent or color of right, and clear and improve it. Hence, as there is neither a legal or moral obligation to pay me for my labor, a promise subsequently made to pay for it, would be without consideration and void.²

An action may be maintained for professional services performed at the defendant's request, by an attorney or counsellor at law,³ a clergyman,⁴ a physician or surgeon whether he be licensed or not.⁵ Formerly the fees of attorneys were regulated by statute, but the measure of their compensation is now left to the agreement express or implied between them and their clients.⁶ It was also, prior to 1844, provided that none but a licensed physician could collect payment for his services.

It is to be observed that where there is an entire contract for work and labor and *materials*, the value of the latter is not recoverable under a count for goods sold, nor can the count for work and labor and materials be maintained, unless the article agreed for has been furnished, and appropriated to the defendant by his consent, and he has acquired a property in the chattel.

To support this count, the plaintiff must in general have *completely performed* the work contracted for, and if not, it is necessary to declare specially if the defendant has wrongfully prevented the plaintiff from performing the work.

For Use and Occupation of Lands, Houses, Rooms or other Real Property.—The statute provides that a "landlord may recover in an *action on the case*, a reasonable satisfaction for the use and occupation of any lands or tenements by any person under any agreement not made by deed, and if any parol demise or other agreement not being

¹ 5 John. 85.

³ 26 Wend. 451.

⁵ Laws 1844, ch. 275; 1 R. S., 4th ed. 861, § 81.

² 5 John. 272.

⁴ 1 Sid. 409; 10 John. 244.

⁶ Code, § 303.

by deed (i. e. under seal,) by which a certain rent is reserved shall appear in evidence on the trial of any such action, the plaintiff shall not on that account be debarred from a recovery, but may make use thereof as evidence of the amount of the damages to be recovered."¹ The *action on the case* is abrogated by the Code of Procedure, but all rights of action secured by the existing laws may be prosecuted by "civil action."²

The action is founded upon contract, and unless there is a contract express or implied between the parties, it cannot be maintained.³ There must be a lease, or evidence showing the relation of landlord and tenant,⁴ and therefore when defendant enters on the premises under an agreement to purchase, the action will not lie.⁵ But wherever the defendant occupies by permission of the plaintiff, whether there be any stipulation as to rent or not, the action lies to recover the reasonable compensation implied by law. And in such a case, the defendant will not be permitted to question the plaintiff's title. If the occupation was not by the landlord's permission, his remedy is not for the use, but for the wrong.⁶

Where the defendant occupies under a lease or permission from the landlord, although he may not be the immediate lessee, but may hold as his assignee or under-tenant, the law implies a contract from him to pay the landlord for the use and occupation of the premises. Thus, if A. agree to let lands to B., and B. permits C. to occupy them, A. may recover against C. for their use.

The action lies where there is a sealed agreement to *give* a lease, and the defendant enters and occupies. Here the tenancy is not by the deed, for that is only executory and a parol demise is implied.

It also lies where a tenant holds over his term, the law implying a renovation of the contract for another year. And as the tenancy in some cases will continue until after a

¹ 1 R. S. 748, § 26, [4th ed. 155, § 20.]

² Code, § 468.

⁴ 7 Har. & John. 251; 13 John. 489.

³ 1 Term, 378, 387; Chit. on Cont. 107;

13 John. 240.

⁵ 6 John. 46.

⁶ 1 Esp. Dig. Gould's ed. 56 to 62; 13 John. 240.

notice by one of the parties to the other, a brief synopsis of the rules in relation to its termination is here given.

When a lease is made providing for an annual rent, whether payable yearly or quarterly, but without limit to the period of holding, it is called a *general letting*, and the holding a *tenancy from year to year*. This tenancy exists also where a tenant either by the express or the implied permission of his landlord continues to occupy lands after the term for which they were leased has expired;¹ and it may arise from a parol lease void by the statute of frauds, where the tenant has entered under it.² In either of these cases, neither party can terminate the lease, but by giving notice of the intention to the other at least one month before the end of the current year;³ and if no notice is given, the landlord cannot compel the tenant to quit; and the tenant will be liable for the rent for the ensuing year, unless the landlord takes possession or lets it to another tenant.⁴ Where an action is brought for the rent against a tenant holding over, he cannot defend himself on the ground that the landlord has no title.

The tenancy from year to year is upon the terms of the old lease, so far as they are applicable to a yearly holding, unless there appears some agreement to the contrary. But where the old rent was merely a ground rent and the landlord is entitled to the buildings erected by the tenant, the annual value of both the land and the buildings is the measure of damages.⁵ Either party, however, may show an express agreement to vary the rent.⁶

In the city of New York, agreements for the occupation of lands or tenements, which do not specify the duration of the occupation, are, by statute, deemed to be valid until the first of May next ensuing the possession, and the rent payable upon the usual quarterly days, unless otherwise expressed.⁷

¹ 15 John. 505; 4 Cowen, 849; 14 Wend. 827.

⁴ Chit. on Cont. 258; 13 John. 240, 297; 25 Wend. 669; 1 Denio, 113; 2 Id. 84.

⁷ 1 R. S. 744, [4th ed. 162, § 14]

² Chit. on Cont. 257, 258; 8 Wend. 219.

³ 1 R. S. 745 §§ 7 to 9, [4th ed. vol. 2, p. 153.]

⁵ Chit. on Cont. 258; 15 John. 505.

⁶ 2 Wend. 507.

In an action for use and occupation, it is not necessary to prove an express contract with the tenant when he took possession, to take the premises, an express reservation of rent, nor that the tenant has paid rent. Where the holding by permission is established, the right to a reasonable rent is implied; and if it appears that a certain rent was reserved, that will govern the recovery.¹ And although there be a written agreement not under seal, upon which the premises were held, and the plaintiff in his complaint omits to mention it, and simply alleges that the defendant is indebted to him for the use and occupation of the premises, yet when the agreement is produced, the rent reserved in it will fix the measure of damages; and the defendant is not at liberty to give evidence of the value of the use, to reduce the recovery below the stipulated rent.²

Where there was an agreement to lease a house for five years, by leases to be executed, and the defendant entered and subsequently refused to accept the lease, the Court held that the plaintiff might bring his action for the use and occupation and not upon the agreement; and that as it was not on that, the statute of frauds was no bar to it. It also held that the taking of the key of the house by the defendant, without a continued occupation, was sufficient to warrant a recovery.³

The action is maintainable where the premises are destroyed by fire after the letting before the rent accrues.⁴ It will not lie against a tenant holding over, where proceedings are instituted under the statute to evict him; nor where the title is in dispute between the plaintiff and defendant, the Courts refusing in this manner to determine a question of title;⁵ nor for premises let for the purpose of prostitution;⁶ nor where there has been no occupation by the defendant during the term for which the premises were leased.⁷

What I have stated in relation to the law governing use

¹ 2 Gill & John. 326.

³ 3 Wend. 219.

⁵ 1 Wend. 134.

⁷ 1 Denio, 37.

² 7 Wend. 109.

⁴ 4 Taunt. 45.

⁶ 2 Com. Cont. 510 to 525; 4 Kent's Com. 112, 113.

and occupation, is sufficient to give the reader a synopsis of the rules which control this subject.

For Money Paid by one Person for the Benefit of Another.—To maintain an action for money paid, it must appear that money, or something equivalent, has been actually advanced. But property received as money will support this count for money paid.¹

It must also appear, that the plaintiff paid money for the defendant, and that such payment was made at the defendant's *request*, express or implied.²

It is clear, however, that if money be paid by a person in consequence of a legal liability to which he is subject, but from which a third person ought to have relieved him, by himself paying the amount, a *request* will be implied.³

But if one, of his own accord, and without any *legal* obligation, pay money for another, no action will lie to recover it *back*.

Thus, if an officer, without any request, pay an execution, or a collector a tax, the payment will create no right of action against the defendant or person taxed.⁴

For Money Had and Received.—The form of this count is extremely simple and plain, merely stating that the defendant is indebted to the plaintiff in a certain sum for money had and received by the defendant, to and for the use of the plaintiff.

It must in general appear that the defendant has received money; positive proof need not, however be given, for if it may fairly be presumed from the facts *proved*, that the defendant has received the plaintiff's money, it will be sufficient.⁵

When goods or other property, improperly received by the defendant, are saleable, it may, under the circumstances and after a lapse of time, be *presumed* against him, that he has sold the property and received the money, pro-

¹ 8 John. 202 7 Cow. 662; 10 Wend. ⁴ 10 John. 361; 14 John. 87.

498.

² 1 Chitty Pl. 884; 5 Cow. 587.

⁵ 7 John. 182; 11 John. 464; 10 Wend. .

436.

³ 1 Chitty Pl. 884.

vided there be reasonable evidence that the defendant has converted the same into *money*, but not otherwise.¹

The principle is elementary that where one person receives money for another and the law makes it the duty of the person thus receiving it to pay it to the person for whom or for whose use it is thus received, a promise to pay it in accordance with the duty is always presumed, and a priority established as matter of law between the parties. It is unnecessary to cite authorities for so plain and well established principles.²

An action for money had and received lies against a sheriff for money collected by him in favor of the person for whom the money was collected. This is well settled.³

Where money has been collected and placed in the hands of town officers for the purpose of paying interest on bonds issued by the town pursuant to the provisions of a statute, and the statutes makes it the duty of such officers to apply the money in satisfaction of such interest, a bondholder may maintain an action against such officers to recover the interest due upon his bonds.⁴

Under a complaint containing a count for an indebtedness from the defendant to the plaintiff for hay, corn and other property sold and delivered by the plaintiff to the defendant at his request and for *money had and received*, the plaintiff offered to prove a tortious taking, the sale of the property and the receipt of the money by the defendant and to *waive* the tort and go for the money had and received, or for the value of the hay and the corn as for goods sold and delivered. *Held*, that the plaintiff should have been allowed to prove the conversion of his hay and corn by the defendant, and the receipt of the money by the defendant to the plaintiff's use is the fact which constitutes the cause of action in such a case.⁵

The action for money had and received is a liberal action in which the plaintiff waives all tort, trespass and damages,

¹ 1 Chitty Pl. 348.

² Ross vs. Curtis, 30 Barb. 238, and cases cited.

³ Shepherd vs. Hoit, 7 Hill, 198.

⁴ Murdock vs. Aikin, 29 Barb. 59; 6 Cow. 465.

⁵ Harpending v. Shoemaker, 37 Barb. 270; 16 N. Y. 260.

and only claims the money the defendant has actually received. To have alleged the wrongful taking and conversion and claimed damages upon contract for the money would have been improper.¹

Money is received under an implied promise to pay it to the proper owner :

1. When received by an agent for his principal, an attorney for his client, a sheriff or constable on an execution, or a justice in the course of his business, all of whom, in some degree, are agents of the party for whom they receive it.

2. When paid under mistake, or through the deceit of the other party. As when two men are reckoning, if one through mistake overpays the other, the latter receives it to the use of him paying it ; and if one falsely tell me he has paid certain money, or performed certain work for me, and I pay him for it, the money so obtained from me by the deceit, is received by him to my use. In case of a mistake, it must be a *mistake of fact*. That is, there must some fact exist which is unknown to the parties, with a knowledge of which the payment would not be made, or some fact be supposed to exist which induces the payment, which really does not exist. The principle upon which the rule is founded, is, that if the parties believing that a certain state of facts exist, come to an agreement with such belief for its basis, on discovering their mutual error they are remitted to their original rights. But a *mistake of law* will not avoid the transaction, nor render the money in the hands of him who receives it the money of him who paid it. As where one is truly acquainted with the facts, but is ignorant of or misconceives their legal consequences. Here his mistake is one of law, and the party receiving the money takes it to his own use.²

Where a clerk to whom moneys of his employer have been entrusted, used and lost the same at a gambling house. *Held*, that an action for moneys had and received could be

¹ 16 N. Y. 250; 12 How. 326; 6 Barb. 658. ² 1 Wend. 355; 20 Id. 174; 1 Hill, 287; 9 Pick. 112; 2 Hall, 252.

maintained by the employer of such clerk against the proprietors of the gambling house where such moneys were lost.¹

3 When paid upon a consideration which happens to fail ; as if I advance money to a man for carrying my goods, and without my fault he fails to carry them ; or to one upon his promise to sell and deliver me certain goods, and he fails to do so.

4. When paid as a consideration for an agreement which is afterwards rescinded. As where A. and B. made a contract for the sale and purchase of a quantity of timber to be delivered at a future day, and fifty dollars upon account of it is paid by B. at the time of making the contract, on the recission of the contract, A. is held to have received the money to the use of B. In such a case, however, when a purchaser would rescind a contract and entitle himself to the money paid upon it, he must place the vendor in the same situation that he was before the sale.

5. When paid to one acting under or in pursuance of a *void authority*. As if one come to me in behalf of my creditor with a forged order or power of attorney to receive the debt, and I pay him the money. Here, although both of us may have supposed the order or power of attorney to be good, yet the authority being in fact forged and void, the money was received to my use.

6. When obtained by *extortion, imposition, or taking an undue advantage of the party's situation*. As where I pledge my horse for a debt of one hundred dollars, and the bailee upon my tender of the sum owing, refuses to redeliver him unless I pay an additional sum, which in order to obtain him, I pay ; where one sells me lands which have no existence, and receives of me the money for the price ; where my friend is insolvent and I give one of his creditors a sum of money to induce him to become a petitioning creditor, or to grant him a letter of license ; or where a sheriff or constable or other officer extorts money, or receives exorbitant fees. But money paid under an order, decree or judgment of a court, although the judgment is fraudulent, is not received to the use of the party paying it.

¹ Caussidiere vs. Beers, 2 Keyes, 198.

7. When embezzled, or moneys of which one has been defrauded by cheating or otherwise. As where money is embezzled or stolen by one's clerk, servant or other person, or obtained from him by any cheating at play by false cards or dice.

8. When paid under a judgment or adjudication of any court which is afterwards reversed for error.

9. When paid upon any contract declared void, either by common law or statute, except in cases where the party himself is a party to the criminality, as in case of an usurious contract. And where a contract is entered into, the object of which is to violate the provisions or the spirit and policy of a public statute, and one pays money in furtherance of it, and it is in part executed by a partial accomplishment of the original design, leaving a portion of the money advanced unexpended, an action will not lie to recover it back. In some cases, however, statutes provide that one paying money on an illegal contract may recover it from the person receiving it, as where money is wagered,¹ or paid for a chance in a lottery or raffle,² or where more than twenty-five dollars is lost at play.³

In order to give illustrations of the classes of cases enumerated, the following abstract of decisions under each of them, where actions have been, and where they have not been maintained, has been collated. They are not given as all the reported decisions, but as sufficient to show the variety of transactions from which are implied the receipt of money to the plaintiff's use, and promises to pay it to him, and such as are not within the rule.

Under the FIRST CLASS, when received by *agents, attorneys, officers, &c.*, and held to be received to the plaintiff's use: Money received by an agent or attorney for the plaintiff, who refuses to account for it and pay it over, (4 Day 175; 3 Greenl. 369; 7 Id. 298; 7 Mass. 14; 3 Cow. 624;) or where he has received a note for the plaintiff for which he refuses to account, (3 Mass. 403; received by the

¹ 1 R. S. 662, [4th ed. vol. 2, 72, § 9.]

² 1 R. S. 665, [4th ed. vol. 2, 76, §§ 31, 32.]

³ 1 R. S. 662, [4th ed. vol. 2, 73, § 14.]

defendant to pay over to the plaintiff, (11 Mass. 147; 3 Har. & McHen. 451; 17 Mass. 575, 400; received by the defendant, a banker, to pay a bill deposited with him belonging to the plaintiff, although the banker's clerk had told the person paying the bill he could not give it up until he had seen his master, (14 East. 582, n.;) received by the defendant from the plaintiff to retain until it should be ascertained whether it should be paid to a third person, and by the defendant paid over without plaintiff's concurrence, (7 Moore, 465;) received by the defendants, assignees of a bankrupt, or an insolvent debtor, and due to the plaintiff for his dividend under the order of the Court, (Doug. 437;) or received by him under a voluntary assignment in favor of creditors, (4 Pick. 59;) received by the defendant to whom securities had been given in trust to collect and pay certain debts and the balance to the plaintiff, (12 John. 276; 1 Har. & Gill, 485;) where the defendant, plaintiff's factor, had sold his goods and taken in payment for them and a debt of his own, the purchaser's bond, although no money had in fact been received, (6 Cowen, 183, note a;) or where he has received the purchaser's note, when not authorized to sell upon credit, (5 Pick. 389;) or where goods have been consigned by the plaintiff to the defendant to sell, and he, after an unreasonable time has expired, has refused to render an account of them, (7 Pick. 214;) the plaintiff's share of moneys received by the defendant as the whole price of an article held by him and the plaintiff as tenants in common, (2 Caines, 166; 15 John. 159; 1 Wend. 470;) the plaintiff's share of moneys received by the defendant, his co-surety, for the amount they have been compelled to pay as bail for a third person, (1 Wend. 202; 5 Id. 48;) received by the defendant from the plaintiff as stakeholder upon an unlawful wager, (10 John. 468; 3 Denio, 103; 1 Comst. 392;) received by the defendant, the drawee of a bill of exchange which he had not accepted, to enable him to pay it, the plaintiff being the endorsee of the bill, (3 Camp. 176;) received by the defendant, the drawer of a bill from the plaintiff, the acceptor, to pay it, where the drawer succeeds in a defence upon the bill, (3 Camp. 107;) received by the

defendant, the holder of a note from the plaintiff, an endorser upon it, to pay a judgment recovered upon it against the plaintiff, when it appeared that previous to the payment the defendant had discharged a prior endorser, (4 Wend. 360;) where the defendant, an insurance broker, had, without receiving for the plaintiff his principal moneys due him from the underwriters, discharged them upon an adjustment with them of private accounts, (3 Camp. 399;) money levied by the defendant, a sheriff, upon the plaintiff's execution, (3 Camp. 430; 6 Cowen, 465; 1 Wend. 534;) where the defendant, a sheriff, has returned an execution as collected, although he had not demanded payment upon it, (3 Camp. 347; 2 Greenl. 91;) where the defendant, a sheriff, has taken a note from a defendant in an execution to indemnify him for an escape, and the plaintiff has demanded the note and he refuses to give it to him, (5 Wend. 207;) moneys received by the defendant, an administrator, who has drawn an order in favor of the plaintiff for his debt against the intestate, the order having been allowed defendant on his accounting, but never having been accepted by the drawee, (13 John. 510.)

In the following cases, however, an action for money had and received has been held NOT to lie; against an attorney for moneys collected by him where a demand had not been made before suit, (5 Cow. 376; 4 Greenl. 532;) against one bound by contract to pay a sum when he shall receive it of his debtor, he having taken a mortgage from the debtor to secure the debt, (4 Pick. 60;) where plaintiff paid money to seamen in advance for their wages, which they deposited with the defendant to indemnify him for covenanting that they should not desert, they having deserted, (13 John. 508;) where a debtor of plaintiff placed money in defendant's hands to pay the debt, there being no communication or understanding between the plaintiff and the debtor concerning it; the reason here given was that there was no privity between the plaintiff and the defendant, and the debtor might at any time make a different disposition of the money, (24 Wend. 260;) by plaintiff against an agent whom he had directed to send money by a certain route, when the agent sent it by

another, by which means the money got into the hands of his creditors, (2 Camp. 68;) by a banker against a partnership for money paid by him and charged the partnership upon a bill drawn by one of the partners in his own name, the bill having been negotiated by the same agent who had procured discounts from the banker for the firm, (15 East. 7;) by one who lays illegal wagers in the defendant's name, and then without his subsequent direction pays them, (4 Taunt. 165;) by plaintiff in whose name defendant makes a contract, sues and collects money upon it without the knowledge of the plaintiff, (4 Taunt. 380;) by a landlord against a sheriff who sold the goods of a tenant without paying a year's rent due, (3 Camp. 260;) by the purchaser of an equity of redemption against a mortgage for the surplus arising on sale of the mortgaged premises, the mortgagee having obtained a judgment against the mortgagor which was a lien against them at the time of the purchase of the equity of redemption, (13 Wend. 488.)

Under the SECOND CLASS of cases, where in consequence of *mistake* or *deceit*, the defendant is held to have received money to the plaintiff's use, are the following: as a general rule, the inquiry is to which party in equity and justice does the money belong, (2 Denio, 91;) money paid to defendant by the plaintiff under a mistake of facts, (6 Barn. & Cress. 671; 3 Wend. 412; 3 id. 69;) overpaid by mistake on a purchase of goods, or where by mistake, a note for goods purchased was given for more than the price, notwithstanding it was paid after the discovery of the mistake, (4 Pick. 228;) where on settlement of a bond the obligor was, by mistake, credited with a year's interest which had not been paid, (8 Wend. 561;) money paid the defendant for a bank note or a bill of exchange which turns out to be a forgery, neither party knowing it at the time, (5 Taunt. 488; 2 Har. & John. 368; 17 Mass. 33; 1 Hill, 287;) but in the case of a forged bank note it should be returned within a reasonable time, or the right to recover the money paid for it will be waived, (17 Mass. 33;) where the plaintiff the promisee of a note, received from the defendant a counterfeit bank bill in payment, (6 Mass. 182;) money paid by the

plaintiff to defendant upon the return of a bad check, mistakenly supposed to have been sent by the plaintiff to the defendant's bank, (3 Mass. 74;) paid by the plaintiff, the endorser of a note void in its creation, to the defendant, the holder of the note, notwithstanding the endorsement was *bona fide*, (8 Mass. 402;) money received by the defendant upon an execution in his favor, the proceeds of goods not belonging to the debtor, levied upon and sold by the sheriff, the plaintiff, (2 Camp. 452;) where the plaintiff, the endorser of a bill upon which he has not been charged, pays it under the belief arising from a misapprehension of facts that he is liable, (9 Mass. 408;) paid by an executor or administrator, who supposes the estate he is administering solvent for a debt against it, it subsequently appearing to be insolvent, (17 Mass. 380;) paid to the defendant, a collector of taxes, who had advertised the lands of several non-residents for sale and received the whole expense from the plaintiff, who was one of them, (2 Day, 369;) where on settlement of accounts, a note was given by mistake for more than the true balance, the excess was held money received to plaintiff's use, although the note was unpaid, (1 Greenl. 152;) money by mistake paid by the plaintiff to the defendant, an agent, who had before notice of the mistake carried it to the credit of his principal upon his books, (3 Maule. & Selw. 344.) To protect the agent against the payment, it must appear that he received the money for his principal and had actually paid it to him before notice of the mistake, (1 Taunt. 359; 5 id. 815;) money obtained by any overreaching, false allegation or fraudulent concealment, (4 Mass. 488; 13 Serg. & Rawle, 259;) withheld contrary to equity, (17 Mass. 575,) money obtained upon the note of defendant, upon which he had forged the endorsers' names, notwithstanding the note has not become payable, (15 Mass. 75;) where the defendant paid the plaintiff bills of a broken bank, with reasonable grounds to suspect they were worthless, (6 Mass. 182;) where the defendant fraudulently induced the plaintiff to sell goods to an irresponsible person, and then upon the sale of them by him obtained the money received for them, (2 Ball & Beat. 369; 3 Saund. 274;)

where the defendant, without giving value for them, has got possession of bank notes lost by plaintiff, (2 Car. & Payne, 176;) money deposited by the plaintiff with the defendant for a particular purpose and misapplied, (2 Bos. & Pul. 277;) money paid on an execution issued on a satisfied judgment, (15 Wend. 321;) money paid by the plaintiff on the purchase at a constable's sale of a chattel interest in lands, the constable refusing to convey it, (19 John. 73;) money received by the defendant to pay a bill of exchange to the plaintiff, but which he applied to pay his own debt, (17 Mass. 575; Id. 400;) money paid by the maker of a note under an agreement that it should be endorsed upon it, the defendant not endorsing it, and then taking judgment for the full amount, (16 Mass. 306.) Where the defendant has received the plaintiff's money, it is no defence to him that he has paid it out upon a forged order or receipt, nor that he has paid it upon a check which had been altered, (8 Dowl. & Ryl. 464; 5 Barn. & Cress. 750.) And in all cases where money has been paid by the plaintiff to the defendant by mistake, notice of the mistake and demand of repayment, before bringing the action to recover it back, are unnecessary, (18 John. 485.)

In the following cases the action was NOT sustained: where plaintiff voluntarily paid an award made by arbitrators, although it was obtained by fraud, (8 Mass. 402; 12 Id. 134; 1 Day, 130;) money paid under a full knowledge of the facts, but under a mistake as to the law, (5 Taunt. 143; 12 Mass. 134; 9 Cow. 674;) in the latter case the doctrine of payments by mistake is very fully examined; paid on a forged note both parties being innocent in the transaction, (17 Mass. 1;) paid by an executor who had requested the defendant to purchase a note against the estate, when it appears that the amount paid exceeded the dividend to which the note would entitle the holder, (7 Pick. 46;) paid by the drawee of a forged bill to an innocent holder, (3 Coms. 230.) But where upon a settlement of accounts between plaintiff and defendant, a third person computed the interest and without their knowledge compounded it, and the plaintiff brought his action for the excess of interest, it

was held a mistake of fact and the plaintiff recovered, (2 Denio, 107.)

Under the THIRD CLASS, money paid upon a consideration which happens to fail, are the following decisions: money paid the defendant on the sale of property the title to which turns out to be defective, (5 Burr. 2639; 5 Pick. 480;) and this though the payment have been made in the note of a third person, this being deemed an equivalent to the payment of money, (3 Cowen, 272; 10 Mass. 31; 13 Id. 216;) where the thing contracted to be sold is not delivered, (1 Str. 407;) money paid to the defendant on his contract to deliver a chattel, and the delivery is a condition precedent to the sale, when before the delivery the chattel is destroyed, (1 Wend. 58;) paid by plaintiff as the price of hay sold by him for the defendant, and paid to him before payment by the purchaser or delivery, when the defendant's servant sent to deliver it, is before delivery, cheated out of it, (8 Bing. 86;) obtained on a bill of exchange received by defendant in advance for goods which are not delivered, (4 Maule & Selw. 476;) paid for goods which turn out to be of a different kind from those contracted for and of little value, the plaintiff returning them, and this though there be neither fraud nor warranty, (15 Mass. 319;) paid for goods on a contract of sale void by reason of defendant's fraud, the plaintiff rescinding the contract and returning or offering to return the goods, (4 Mass. 502; 13 Id. 319;) money paid by the plaintiff on a parol contract for land, or received by the defendant on a note given him by the plaintiff on such contract, the contract being void by the statute of frauds, (15 John. 503;) advanced to the defendant, a broker, to pay duties on goods, upon his representation that he would by their sale discharge his lien and leave a surplus—the sale being defeated, (5 Taunt. 446;) money paid to defendant as a consideration for a service, contracted to be performed, which he puts it out of his power to perform, or when he prevents the plaintiff from performing his part of the contract, and so defeats it, (7 Cowen, 24;) money paid by the plaintiff, an endorser upon a judgment recovered against him on a note, where

the holder, before the judgment, had discharged his prior endorser, (4 Wend. 360;) money paid to defendant upon a security which turns out to be of no value, or different from what was intended, as upon a genuine note with a forged endorsement, (15 Mass. 75, 156;) money paid on subscription to support a minister, where the fund was not so applied, (3 Pick. 322.)

In the following cases, the action was NOT sustained: for money paid on a parol contract for lands, there being no default in the vendor, (12 John. 454; 9 Cowen, 46;) money paid on an agreement to purchase lands where all the payments were not made according to the contract, and the land is sold to another, (4 Barb. 354;) paid as the consideration of a quit-claim deed on the title failing, there being neither fraud nor warranty, (6 Mass. 81;) so though there be a covenant that the grantee shall have it after grantor's death, (4 Mass. 135;) paid an executor for lands of his testator, sold under a license for the payment of debts, the lands having been recovered from the plaintiff by an older and better title, (4 Greenl. 101;) paid by a judgment creditor to redeem land, he failing to pay the whole debt, (6 Greenl. 142;) paid for lands purchased, afterwards ascertained to be deficient in quantity, the relief being an equitable one, (3 John. 506;) paid for goods delivered agreeably generically with the sample and contract, but miserable in quality, and wholly unfit for use, the proper remedy being upon the implied warranty, (2 Camp. 416;) an action by the payee against the maker of a note on the failure of its consideration, the giving of a note not being an equivalent to the payment of money, unless it be received as such in payment or discharge of a liability of the party sought to be charged, (1 Wend. 424.)

Under the FOURTH class, where money has been paid as a consideration for an agreement which is afterwards rescinded, are the following cases: money paid by the plaintiff upon a conditional sale, or contract, that is rescinded, (1 Term, 133; 1 Caines, 47; 12 John. 363;) money paid by the plaintiff to the defendant in consideration of an act to be done by him, and which he fails to do,

(3 Pick. 20 ;) money paid on a contract void for want of power in the opposite party to contract, (7 Mass. 31 ;) in consideration of a void bond, (2 Bos. & Pul. 467.)

Where, however, a payment has been made upon a contract still open, and neither fulfilled or rescinded, the action will NOT lie, (Doug. 23 ; 7 East, 274 ;) nor upon one that has been in part executed, (1 N. H. 17 ;) and generally where one seeks to recover money paid under a void or rescinded contract, must show that he in fact paid money, (5 Barb. 319.)

Under the FIFTH class, moneys received in pursuance of a void authority, it is held that money paid by the plaintiff to the defendant under the sentence of a court having no jurisdiction, may be recovered, (Ld. Raym, 642 ; Cowp. 419 ; 4 Cowen, 454.) So if paid to the innocent second endorsee of a certificate of deposit which had been stolen, and an endorsement of the payee forged, (1 Hill, 296 ;) or if paid to the holder of a draft payable to the order of one whose endorsement is forged, (1 Hill, 287 ; 2 Sand. 431.) The action was sustained against the United States Marshal to whom the plaintiff, a surety upon a recognizance estreated by the United States Circuit Court, had voluntarily paid the penalty, and afterward, when the Court adjudged the recognizance void, before the money had been paid over by the Marshal, demanded it of him, (1 Barb. 355.)

In the following cases, the action was NOT sustained: against one having money belonging to an estate, who paid it to one having the probate of a forged will, (3 Term, 125 ;) against a tax gatherer for a tax erroneously paid, but which he has paid over, (4 Term, 553 ; Cowp. 66 ;) against a public officer who has collected money by order of his official superiors, (1 John. 515 ;) money paid with knowledge of the material facts in satisfaction of a claim which could not be enforced at law, (4 Pick. 114 ;) paid on an illegal distress, the remedy being for the wrongful act, (2 N. H. 461 ;) by the drawee of a forged bill against an innocent endorsee to whom he paid the amount, (3 Burr. 1354 ; 6 Taunt. 76.)

Under the SIXTH CLASS, moneys obtained from the plain-

tiff by *extortion, imposition, or taking an undue advantage of his situation*, are the following : paid by the plaintiff to officers of the revenue to discharge goods which he seized for want of a permit, when in fact they had one, (4 Term, 485 ;) unlawful fees required by a District Clerk of the United States Court in a suit relating to the wrongful seizure of a vessel before he would give an order for its delivery, (9 John. 370 ;) money demanded for illegal fees and paid to a public officer, (4 Dowl. & Ry. 283 ; 2 Barn. & Cress. 729 ; 2 Barn. & Ald. 562 ; 1 Chitty, 296 ;) excessive tolls taken from plaintiff, (2 Barn. & Ald. 206 ; 4 Barn. & Cress. 200 ;) money received by the defendant a landlord, upon a distress for his whole rent, when a part had been paid by the tenant for the property tax, upon an agreement that it should be credited on account of the rent, (1 Maule & Sel. 609 ;) paid under terror of a threatened distress which is unauthorized, (1 Taunt. 359 ;) paid for irregular charges made by a landlord against his tenant in consideration of a forbearance to distrain for rent, (5 Bing. 37 ;) paid the defendant to whom goods were pledged, who refused to deliver them without receiving more than was due upon them, (2 Str. 915 ;) paid an insurance company on its refusing to transfer to plaintiff certain shares purchased by him until he had paid certain notes it held against a former insolvent holder of the stock, (3 John. Cas. 238 ;) paid as the only means of recovering possession of property to which the plaintiff was entitled, (9 Dowl. & Ryl. 889 ; 7 Barn. & Cress. 73.)

In the following cases, an action will NOT lie: for money voluntarily paid on a disputed claim, though the party reserve his right, (1 Day, 130 ;) paid under compulsion of legal process, the plaintiff before payment knowing the cause of action, and there being no fraud, although it afterward be discovered that the money was not due, (2 Moore & Scott, 811 ; 9 Bing. 644 ;) paid voluntarily for toll of which the law would not compel the repayment, (2 Cowen, 419 ;) paid the owner of lands sold by loan officers to obtain a release from the defendant who had purchased them agreeing to buy as trustee for the owner, (14 John. 358 ;)

an action brought against the vendor by a vendee of property paid to a third person, in whose possession it was, upon an unfounded claim, in order to obtain it, unless notice be given of the claim, (3 Car. & Payne, 520;) an action by one who had distrained goods and delivered them to defendant on his promise to pay the rent, (4 Term, 687.)

Under the SEVENTH CLASS, where money has been embezzled, or stolen by a man's clerk or servant, or obtained from him by cheating at play, a nurse, who on the death of the person she attended, embezzled his money, was held to have received it to the use of his estate, (Bull. N. P. 130;) so where a carrier, employed to carry the plaintiff's money, lost it at a gambling table, a recovery was had against the winner, (17 Mass. 560.)

Under the EIGHTH CLASS, where money has been recovered that has been paid upon a judgment or decree, which after the payment has been reversed for error, the following cases are found, (6 Cow. 297; 10 Wend. 354; 24 Wend. 32; 5 Paige, 539; 1 Har. & John. 405;) where the plaintiff held a bottomry bond for money lent, and after a capture and condemnation of the vessel, the condemnation was reversed and a compensation awarded and paid, the action was sustained against the obligor, (3 Mass. 443.)

In the following cases, the action was NOT sustained: to recover money paid on a judgment of an inferior court, on the ground that it was unjustly recovered, (8 John. 470; 2 Cowen, 428; 1 N. H. 33;) or that a good defence has since been discovered, (9 John. 232;) or that the party paying had a good defence which he neglected to interpose, (9 John. 244; 2 Esp. 546;) paid a tax over-charged by the assessors, (6 Pick. 98;) to recover back any part of money paid a sheriff on a forfeited recognizance where after payment, it is mitigated by a court, not authorized, to a small sum, which only the sheriff pays, and then agrees to pay plaintiff the balance, (7 Barn. & Cress. 293; 2 Car. & Payne, 621;) against defendant, a creditor of B., to whom C. assigns a judgment against the plaintiff to apply on his debt, which the plaintiff pays the defendant, and the judgment is afterwards reversed, B. having become insolvent,

(2 Day, 153;) money paid in satisfaction of a valid judgment, although upon an execution which is irregular, (6 Barb. 308.)

Under the NINTH CLASS, to recover back moneys paid upon any contract declared void by the common law or by statute, are the following cases: money paid to compound a *qui tam* action, (8 East. 378;) or to a magistrate for the use of the poor to avoid a prosecution for a misdemeanor, (9 East. 49;) paid a lottery office keeper for illegal insurance of lottery tickets, (2 Bl. 1073; 1 H. Bl. 65; Cowp. 790;) or expended by the plaintiff's clerk without his knowledge for such a purpose, (Cowp. 197;) paid to a stakeholder on an unlawful wager, (3 Denio, 103, 107; 1 Comst. 392;) to withdraw opposition to an insolvent's or bankrupt's discharge, (3 John. 386; 3 Selden, 176;) paid on a contract which is *malum prohibitum*, if the action be founded on its disaffirmance, (8 Cowen, 20;) or on an illegal executory contract, (8 Barn & Cress. 221;) paid by a debtor for interest beyond the legal rate, (20 John. 290; 11 Mass. 368; 13 Id. 104; 9 Id. 48; 2 Aik. 303.)

In the following cases, the action does NOT lie: money voluntarily paid by plaintiff to obtain the performance of an agreement for which he has no legal remedy, as a parol agreement concerning lands, (4 John. 240;) paid in advance on a contract with defendant to deliver in 60 days, 100 shares of stock which he then owns, on the ground that at the time of delivery he had but 40 shares, (7 Cowen, 24;) paid a District Attorney for discontinuing a criminal prosecution, (2 Conn. 209;) paid on an illegal contract for maintenance, (6 Cowen, 431;) under the English statutes prohibiting unlawful wagers, where moneys are deposited with a stakeholder and by him paid over to the winner with the loser's consent, they cannot be recovered. The statutes of this State, however, while declaring all contracts in violation of the laws against gaming, raffling and lotteries void, authorize the recovery of moneys staked or raffled for, in the hands of a stakeholder, or of whomsoever they may be, and whether paid over by the stakeholder or not, (1 R. S. 662. 4th ed. 72, 76.)

For money paid for defendant.—Here, to maintain the action, money must have been actually expended for the defendant at his request, or under circumstances from which the law will imply a request. As where the plaintiff is so situated in relation to the defendant that he is called upon to make a payment of money for him. The case of money paid by the plaintiff as surety for the defendant, or as maker or endorser of a note for his accommodation, is a common one under the rule.¹ And where the plaintiff is one of several co-sureties for a third person, and he pays the obligation, he may recover the money paid from the principal debtor, or without showing the inability of the principal, may recover from each of his co-sureties, or if they be dead from their legal representatives, their respective shares of the sum paid.²

By a Surety.—Wherever the relation of surety exists, whether the surety became so by actual contract or the operation of law, if he is compelled to pay the debt which his principal ought to pay, he may bring his action against him for the money paid;³ and this notwithstanding he paid it upon a bond which could not have been enforced against the principal, if the payment be made without fraud or negligence.⁴ Thus one who is bail for another, can recover all the expenses to which he has been put by reason of it, including the expense of sending for his principal to surrender him, but not of a suit improperly defended,⁵ nor for trouble and loss of time in going to a place to become the bail.⁶ So where a defendant in execution escapes from the sheriff or constable, by reason of which the latter is compelled to pay the debt, or where the plaintiff's goods, being on the premises of defendant with his consent, are distrained for his debt and the plaintiff is compelled to pay the rent to release them, or to buy them upon the sale, the action will lie.⁷ But in the latter case, if the goods were not redeemed or purchased by the plaintiff, but sold to another, the action

¹ Kirby, 137; 8 John. 249; 5 Serg. & Rawle, 8; 4 Pick. 283.

² 3 N. H. 270; 17 Mass. 464.

³ 4 Hill, 845.

⁴ 1 Mass. 138; 11 Id. 359.

⁵ 5 Esp. 171.

⁶ 1 Car. & Payne, 434.

⁷ 7 Wend. 119.

would not be for money paid. Where a plaintiff at the request of the defendant, defends an action in which the latter is concerned and may be benefited by the event, and a judgment is obtained against the plaintiff, he can recover against the defendant the expenses of the defence.¹

The money must, or something which is accepted as an equivalent, be paid by the surety and in discharge of the indebtedness of the principal. This may be by the surety's promissory note,² or by land conveyed to the creditor and accepted in discharge of the debt.³ It is not sufficient that he has given his bond for the debt, nor that he is imprisoned in execution upon it.⁴ If, the surety extinguishes the debt by paying only one-half the amount, he is entitled to recover no more than he actually paid.⁵

The payment must also be made by the plaintiff at the request of the defendant, either express or implied. If, therefore, a sheriff voluntarily suffers an escape, or a constable suffers an execution to expire in his hands, and then without the defendant's request pays the debt, he cannot recover the money paid.⁶ So if a collector of taxes pay over my tax without demanding it of me,⁷ or if the endorsee of a bill of exchange pay the amount before a demand of the acceptor,⁸ the payment is a voluntary one. In these cases, however, if the defendant requests the payment to be made, or afterwards promises to pay the money, the action will lie. And the request furnishing the foundation of the claim where one becomes a surety at the request of another surety and the latter pays the debt, he cannot resort to the former for a contribution.⁹

Where one was employed as the agent of certain others to purchase for them a piece of land and take the conveyance to himself, and a third person at the request of the principals became surety for the agent in a promissory note for the purchase money which the surety paid, it was held that the surety alone might have his action against the prin-

¹ 1 Esp. 162.

² 3 N. H. 366; 4 Pick. 444; 8 John. 202; 2 Esp. 571.

³ 7 Cow. 662; 2 Wend. 481.

⁴ 2 Barn. & Ald. 51; 8 John. 202, 249.

⁵ 7 Cowen, 662; 2 Wend. 481.

⁶ 3 John. 434; 8 Id. 436; 8 East, 171.

⁷ 10 John. 361.

⁸ 2 John. Cas. 75.

⁹ 12 Mass. 98.

cipals for the money thus paid.¹ So where two jointly interested in a transaction, execute a bond with A. as surety, and B. at the request of one of the principals pays the bond, B. has his action against the principals, but cannot recover against the surety, as the request of the principals did not enure as his request.²

The action lies by an endorsee against his endorser for money paid on a judgment obtained against the former by the holder of the note.³ So for a payment made by him it is in full,⁴ and upon a second payment he may have another action.⁵ But where two persons make and exchange notes, neither can maintain an action against the other for money paid on his own note.⁶

If a contract within the statute of frauds be performed wholly or partly by one party, and the other refuses to perform it on his part, the action may be maintained by the party performing, to recover the money he has expended in the execution of the contract on his part.⁷

It also lies where one of several defendants pay a judgment recovered against them in an action upon contract for a contribution against each of the others, but not if the recovery was for a *tort*, unless an express promise to pay is shown.⁸ It was, however, held where the recovery was for an injury sustained by the negligence of the defendants' servants, neither party being present, that an action for contribution would lie.⁹

One joint contractor who pays money for another on a mere equitable claim capable of being enforced only in a court of equity, may maintain the action against his co-contractor,¹⁰ and where several are liable for work done and a payment is made to the creditor by a third person at the request of one of the debtors, the action lies against all.¹¹ So where several persons subscribed money for running a stage coach, and appointed an agent to carry out their plan, who

¹ 5 Greenl. 504.

² 5 John. 176.

³ 2 Wend. 369.

⁴ 20 John. 367; 8 Barb. 634.

⁵ 6 Wend. 284.

⁶ 3 Denio, 187.

⁷ 7 Mass. 268.

⁸ 8 Term, 186; Kirby, 114; 2 John. Ch 131; Bibb. 502.

⁹ 2 Car. & Payne, 417.

¹⁰ 6 Taunt. 289; 1 Marsh. 603.

¹¹ 11 Wend. 87.

advanced his money for the purpose, it was held that he might maintain an action against a subscriber for the amount of his subscription.¹ But if one of two joint agents is imposed upon, and in consequence pays money to a wrong person, and is afterwards obliged to pay it over again to the person entitled to receive it, he cannot recover from his co-agent his share of the money paid.²

If one of two joint contractors upon a breach by them of their engagement, without the consent of the other, agrees with their creditor to submit the amount of damages to arbitration, and then pays the award, he may recover from the other contractor his share of the payment so made.³

The action lies by a stranger against the defendant for money paid for necessities furnished to or support provided for one whom he is under a legal obligation to maintain.⁴ Or where the defendant goes abroad, leaving a wife who dies in his absence, and a third person voluntarily pays the expenses of her funeral, suitable to her husband's rank and fortune, though without his knowledge or assent.⁵

Where money is paid for defendant at his request, it is no defence to the action that the defendant lost the benefit of the payment in consequence of the plaintiff withholding the evidence of it until he had been indemnified by the defendant, who refused to pay him.⁶

The action will not lie for money paid on an illegal transaction:⁷ and in all cases of partnership in such transactions, neither partner can recover back money paid for the other, unless he has received express directions to make the payment.⁸ So, money advanced by one to another with a knowledge that it is to be applied in furtherance of an illegal purpose, cannot, after it is so applied, be recovered.⁹

Promissory Notes.

A promissory note may be defined to be a written engage-

¹ 5 Pick. 228.

² Chit. on Cont. 181.

³ 4 Moore, 340.

⁴ 5 Wend. 558

⁵ 1 H. Bl. 90; 3 Camp. 298.

⁶ 7 Mass. 268.

⁷ 4 Taunt. 165; 3 Id. 6; 3 Barn. & Ald. 179; 2 Bos. & Pul. 371; Chit. on Cont. 182.

⁸ 3 Taunt. 11; 2 Marsh. 542; 7 Taunt. 246.

⁹ 2 Stark. Ev. 3d. Am. ed. 104, 5.

ment by one person to pay another person, therein named, absolutely, and unconditionally, a certain sum of money at a time specified therein. The definition given by Mr. Justice Blackstone is, that promissory notes or notes of hand are a plain and direct engagement in writing, to pay a sum specified, at a time limited therein, to a person therein named, or sometimes to his order, or often to the bearer at large. In a promissory note, there are but two original parties, the maker and the payee.¹

In a bill of exchange there are ordinarily three original parties, the drawer, the payee, and the drawee, who, after acceptance becomes the acceptor. In a bill of exchange the acceptor is the primary debtor in the contemplation of law to the payee, and the drawer is but collaterally liable.²

No particular form of words is necessary in a promissory note, it may be varied at the pleasure of the individual, so that it always amounts in legal effect, to a written promise for the payment of money absolutely and at all events, and it interferes with no statute regulation.

A promissory note is a written instrument. A verbal promise however formal in its language, and obligatory in point of law, is not deemed a promissory note. This is obvious upon the slightest consideration.³ Its form is substantially as follows :

UTICA, January 1, 1871.

\$50. I PROMISE TO PAY J. BROWN, [*"or order,"* or, *"or bearer,"* if it is to be made negotiable,] FIFTY DOLLARS, [omitting the time of payment, if payable immediately, and if payable at a future day, inserting the day, as *"on the first of September next,"* or, *"thirty days after date,"*] FOR VALUE RECEIVED.

SAMUEL COLE.

It is not necessary that any particular form should be used. Any words which import an absolute engagement to pay, are sufficient. As a common due-bill in these words: *"Due S. or bearer, \$10 ;"* *"due A. B. \$325, payable on*

¹ Story on Promissory Notes, § 1.

² *Ib.* § 4.

³ Bailey on Bills; Story on Pr. Notes, § 10.

demand ; " " due B. \$1, on settlement ; " a promise *to deliver money* ; that the payee *shall receive money* ; or *to be accountable or responsible for money*.¹ An instrument in these words : " borrowed of J. S. £50, which I promise *never* to pay," was held a good note, the word *never* being rejected as surplusage..² In like manner, an instrument in the following form : " N. will much oblige W. by paying J. R. or order \$20,"³ was held a bill of exchange ; and in another case, where the plaintiff held a note against L., and wrote upon it, " L. M., please pay the above note and hold it against me on settlement," and L. M. accepted it, the instrument was held a bill.⁴

It is not necessary that a promissory note should be dated, although it is safe to write it with one. If it be not dated, all computations of time in relation to it, will be made from the day it was issued, as if payable two months from date, the court will intend two months from the day it was made.⁵

In promissory notes, the signer is called the *maker*, the person to whom it is made payable, the *payee*, and when he endorses it, he becomes the *endorser*, and the person to whom it is endorsed the *endorsee*, who, by endorsing it may become an *endorser*, as in the case of bills. The relative rights and obligations of the parties to promissory notes and bills after acceptance, are very nearly similar, the acceptor and maker standing in the same relation to the payee and endorsers ; the drawer, in the case of an acceptance, standing in the place of an endorser prior to the payee.

Promissory notes and bills should specify by whom and to whom they are payable. If payable " by A. or B.," or " to A. or B.," they are not valid as notes or bills, although if they are expressed to be " for value received," they are good as contracts, and will warrant a recovery in an action for money had and received.⁶ Where there are two persons having the name of either of the parties to the note or

¹ 5 John, 232; 2 Cow. 536; 10 Wend. 675; 1 Hill, 256. ⁵ 4 Barn. & Cress. 908; 6 Maule & Selw. 73; 2 Chit. 300.

² Chitty on bills, 149 to 151.

⁶ 4 Barn. & Ald. 679; 2 Id. 417; 4 Wend. 575.

³ 1 Esp. R. 129.

⁴ 1 Wend. 522.

bill, it is well to distinguish which is meant, by his place of residence, or some addition, as "*senior*," "*junior*," "*second*," &c. Where there was a father and son of the same name, a note or bill payable to the name, was held *prima facie* payable to the father. But if the son held the instrument, he might recover upon it in his own name. A mistake in the name of the payee is immaterial where it can be shown who was intended.¹

They may be drawn payable to bearer generally without the mention of any person as payee, in which case they can be negotiated by simple delivery. They may also be drawn payable to the order of a fictitious person or to the order of the maker, in which cases when negotiated by the maker, they have the same effect as if made payable to bearer.² If the name of the payee be left blank, the holder may insert his own as payee,³ but if the promise is not to pay any one, but simply "I promise to pay \$500 on demand, value received," it is mere waste paper.⁴ If drawn in the singular number, as if a note be drawn "I promise to pay," and signed by two or more persons, it is regarded as made by them jointly and severally, and the holder may bring his action against all or any one of them. If payable to one by a wrong name, he may bring his action in his right name and show the mistake.

Bills and notes take effect from the time of their delivery, without regard to their date, though the presumption is that they are delivered on the day of their date. They may be made payable at any time agreed upon by the parties, as any number of days, months or years, after date, or after sight, or upon any particular day, or upon demand, and with or without interest from the date. If the time of payment is not expressed, they are payable on demand, and in this case they draw interest from date, although there be no mention of interest contained in them.⁵ The time of payment cannot be altered by parol evidence, and a separate

¹ 6 Taunt. 325.

² 1 R. S. 768, § 6, [4th ed. vol. 2, 178;] Chitty on Bills, 179; 3 Hill, 112; 2 Sand. 138.

³ 2 Maule & Selw. 90; 5 Taunt. 529; 1 Marsh. 31; 10 Serg. & Rawle, 170; 4 John. 59.

⁴ 6 Wend. 637.

⁵ 8 John. 189; 15 Wend. 308.

written agreement varying it, is not a part of the contract but a distinct one, and the subject of a cross action if violated.¹

An alteration of a bill or note in a *material* part, whether done by a party or a stranger, unless done with the consent of *all* parties concerned, renders it void, even in the hands of an innocent holder. Alterations are material when they affect the date, time of payment, place of payment, sum to be payed, manner of payment, as by inserting after the name of the payee "or order," or consideration.²

But a promissory note, it seems, need not be written in ink, for it has been held that it may be in pencil. It may all be printed except the signature, but the signature must be in the hand writing of the party executing it, or if it be by *mark*, that mark must be verified by the hand writing or attestation of some person who acts for the *marksman* or attests it at his request. If signed by an agent it is of course, in order to bind the principal, to be signed by the agent thereto, or at least signed by him in his character as agent.³

A promissory note may be made by one or more persons; it may be joint, or it may be joint and several, when two or more persons sign a note written thus: *We promise to pay, &c.*, it is a joint note. When two or more persons sign a note written thus: *I promise to pay, &c.*, it is a joint and several note, and they may be sued jointly or severally, at the option of the holder.⁴

If a note be signed by a person in the name of a firm, whether that name represents in form more than one person, as A. & Co., or represents in form one person only, as A., in both cases it is treated as the joint note of the firm, and all the parties may be sued thereon, whether written *We promise* or *I promise*, providing it be the debt of the firm.

When a note is signed by two persons written thus: *We promise*, and signed A. B., principal, C. D., surety, it is still the joint note of both, and if it were written, *I promise, &c.*, and signed in the same manner, it would be the joint and

¹ 8 John. 189; 4 Mass. 414.

² 19 John. 391; 17 Wend. 238; 24 Id. 374.

³ Story on Pr. Notes, § 11; 4 Vermont R. 11.

⁴ Story on Pr. Notes, § 57; 7 Mass. 58.

several note of both. For the language designating the principal and surety does not change the rights of the payee or subsequent holder, but merely ascertains the relation of the makers to each other, and operates as notice of that relation to the other parties thereto.

The drawee of a bill is bound to know the hand writing of the drawer, and if he pays the bill to a *bona fide* holder, he cannot recover the money back, although the bill turns out to be a forgery.¹

And the same rule applies in general it seems to a party who intervenes and takes up a protested bill for the honor of the drawer. If he pays the bill after seeing it, he is concluded by the act, and cannot recover back the money, although the bill is a forgery.²

In general the holder of commercial paper is presumed to have received it in good faith and for value received.³

When, however, the paper is shown to have been put in circulation fraudulently, it seems the presumption is changed, and the holder must show that he received it in good faith and for value.⁴

Payment of a note cannot be demanded on the fourth day of July so as to charge the endorser, but if that be the last day of grace, demand should be made on the third.⁵

When two persons, not partners, endorse a note payable to their order, they cannot be made liable, unless notice of non-payment be given to each, though *otherwise as to partners*.⁶

In order to charge the endorser of a note made by two or more persons, *not partners*, a demand must be made of both makers.⁷

A note given upon the settlement of any doubtful claim against the maker, will be upheld as founded upon a sufficient consideration, without regard to the validity of the *claim*.⁸

¹ Goddard vs. Merchants' Bank, 4 5 4 Hill, 129, Bronson J.; 2 Hill, 587. Comst. 147. ⁶ 5 Hill, 232, Willis vs. Green.

² Id. 230. ⁷ Russell vs. Cook, 3 Hill, 504.

³ Id. 166. ⁸ Id. 504.

⁴ 4 Id

A joint action cannot be maintained against several defendants upon a promissory note, when some of them are *guarantors* and *not makers* or endorsers.¹

An endorsement in blank, is, in legal effect, an agreement to pay on the usual conditions of demand and notice, and the case is not open to the intendment that the party meant to contract a different obligation.²

In an action upon a note, mere inadequacy of consideration, there being no warranty nor fraud in the case, cannot be given in evidence as a defence, otherwise as to an *entire* want of consideration, for that may always be shown as a complete answer to a suit upon an executory contract. If, however, the article sold be of the slightest value, it will be a sufficient consideration for a promise to pay the stipulated price, however disproportionate to the real value—(no fraud being shown.)³

The endorsee of a negotiable note to whom it has been transferred simply as collateral security, is not entitled to be regarded as a *bona fide* holder in the commercial sense.⁴

In an action on a note brought by one not entitled to be treated as a *bona fide* holder, the maker may defend, on the same grounds as though it was in the hands of the original payee.⁵

It is provided by statute that in any suit founded upon any *negotiable* promissory note, or bill of exchange, or in which such note, if produced might be allowed in the defence of any suit, if it appear on the trial that such note or bill was lost *while* it belonged to the party claiming the amount due thereon, *parol* or other evidence of the contents thereof may be given on such trial, and notwithstanding such note or bill was negotiable, such party shall be entitled to recover the amount due thereon, as if such note or bill had been produced. It is, however, further provided, that to entitle a party to such recovery, he shall execute a bond to the adverse party, in a penalty at least double the amount of such note or bill, with *two* sureties, to be approved by

¹ 2 Hill, 188.

² Seabury vs. Hungerford, 2 Hill, 80.

³ 2 Hill, 606; 21 Wend. 593.

⁴ 2 Hill, 140.

⁵ 4 Hill, 424.

the Court in which the trial shall be had, conditioned to indemnify the adverse party, his heirs and personal representatives against all claims by any other person on account of such note or bill, and against all costs and expenses by reason of such claim.¹

Form of a Bond to Indemnify against a Lost Bill or Note.

Know all men by these presents, that we, John Doe, Richard Roe and James Jackson, are held and firmly bound unto John Smith, in the sum of (*here insert double the amount claimed on (the note or bill,) to be paid to him, his heirs and assigns, to which payment we hereby bind ourselves, our heirs, executors and administrators.* Sealed with our seals May 1, 1871.

The condition of this obligation is as follows: The said John Doe is prosecuting an action against the said John Smith, before David Babcock, a Justice of the Peace of Oneida county, upon a promissory note made by said John Smith to said John Doe or bearer, for fifty dollars, dated about the 1st day of November, 1866, which said John Doe alleges is lost. Now, if the said John Doe shall indemnify the said John Smith, his heirs and personal representatives, against all claims by any other person on account of such note, and against all costs and expenses by reason of such claim, then this obligation shall be void. Otherwise it shall remain of force.

JOHN DOE.	[L. s.]
RICHARD ROE.	[L. s.]
JAMES JACKSON.	[L. s.]

I approve of the foregoing sureties, May 1, 1871.

D. BABCOCK, Justice of the Peace.

It will be seen that the above provisions apply only to *negotiable* paper; the remedy upon lost bills or notes *not negotiable* remains the same as it existed previous to the Revised Statutes.

The party is himself a competent witness to prove the

¹ R. S. 406, § 75.

loss of a bill or note, but nothing more ; and in all cases whenever a party is permitted to prove, by his own oath, the loss of any instrument, in order to admit other proof of the contents thereof, the adverse party may also be examined by the Court on *oath* to disprove such loss, and to account for such instrument.¹

It must appear affirmatively that the note or bill was negotiable, or the plaintiff will be entitled to recover without giving the bond, and the burden of proof lies upon the defendant to show that the instrument was *negotiable*, as it is settled that the Court will not *presume* a lost note to be negotiable.²

An action does not lie on a *Bank check* against the *drawer* until after *notice* of presentment and non-payment.³

When a bill or note is payable at a certain day, as so long after date, after sight, or after demand, it is not payable at the time the words naturally import, but the maker or acceptor has till the *third* day after, and exclusive of the day expressed in which to make payment, and has the *whole* of this third day in which to pay, and no action can be brought against him till the morning of the next day. Thus, when a note is made payable the first day of May, it is not due till the fourth, and an action cannot be brought on it till the fifth.⁴

If the third day of grace fall on Sunday, the demand should be made on the day preceding the *third* day of grace.⁵

At the session of the Legislature of 1870, the following statute was passed in relation to holidays :

AN ACT to amend an act to designate the holidays to be observed in the acceptance and payment of bills of exchange and promissory notes, passed April fourth, eighteen hundred and forty-nine.

Passed April 23, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows :

SEC. 1. The following days, viz : the first day of Janu-

¹ 12 Wend. 173; 2 R. S. 327, § 90.

³ 20 Wend. 192; 21 Wend. 372.

² 3 Wend. 344; 12 Wend. 174, Nelson Ch. J.

⁴ 8 Cow. 203; 25 Wend. 673.

⁵ 2 Hill, 537.

ary, commonly called New Year's day, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, and any day appointed or recommended by the Governor of this State, or the President of the United States, as a day of fast or thanksgiving, shall, for all purposes whatsoever as regards the presenting for payment or acceptance, and of the protesting and giving notice of the dishonor of bills of exchange, bank checks and promissory notes, made after the passage of this act, be treated and considered as is the first day of the week, commonly called Sunday; and when either of those days shall occur on Sunday, the following Monday shall be deemed a public holiday, and any bill of exchange, bank check, or promissory note made after the passage of this act, which, but for this act, would fall due and payable on such Sunday or Monday, shall become due and payable on the day following such Sunday or Monday.

§ 2. All acts and parts of acts inconsistent herewith are hereby repealed.

§ 3. This act shall take effect immediately.

The following statute recently passed, clearly defines what commercial paper is not entitled to days of grace:

§ 1. All bills of exchange or drafts, drawn payable at sight at any place within this State, shall be deemed due and payable on presentation, without any days of grace being allowed thereon.

§ 2. All checks, bills of exchange, or drafts, appearing on their face to have been drawn upon any bank or upon any banking association or individual banker, carrying on banking business under the act to authorize the business of banking, which are on their face payable on any specified day, or in any number of days after the date or sight thereof, shall be deemed due and payable on the day mentioned for the payment of the same, without any days of grace being allowed and it shall not be necessary to protest the same for non-acceptance.

§ 3. Whenever the residence or place of business of the endorser of a promissory note, or of the drawer or endorser of a check, draft or bill of exchange, shall be in the city or

town, or whenever the city or town indicated under the endorsement or signature of such endorser or drawer, as his or her place of residence, or whenever in the absence of such indication, the city or town where such endorser or drawer, from the best information obtained by diligent inquiry, is reputed to reside, or have a place of business, shall be the same city or town where such promissory note, check, draft or bill of exchange is payable or legally presented for payment, or acceptance, all notices of non-payment and of non-acceptance of such promissory note, check, draft, or bill of exchange may be served by depositing them, with the postage thereon prepaid, in the post-office of the city or town where such promissory note, check, draft, or bill of exchange was payable, or legally presented for payment or acceptance, directed to the endorser or drawer, at such city or town.

§ 4. This act shall take effect on the first day of July next, but shall not apply to any bills of exchange, checks, drafts, or promissory notes bearing date prior to that time.

If a note payable in *specific* articles fall due on Sunday, it shall be adjudged payable on the Monday following.¹

A bill or note may be endorsed after it is due, in which case it must be demanded, and notice given in a reasonable time, as in cases of bills payable at sight.²

A full indemnity given by a maker to the endorser, to secure him against his liability as endorser, or a promise to pay by the endorser, with a knowledge that no demand was made, will, in either case, dispense with demand and notice.³

Due presentment for payment, and notice of non-payment are conditions precedent to the liability of an endorser of a promissory note.⁴

No precise form of words is necessary in giving notice. It is sufficient if the language used is such as to convey, either in express terms or by necessary implication, notice to the endorser of the identity of the note, and that pay-

¹ 1 Cow. Tr. 223.

² 9 John. 121; 1 Cow. Tr. 237.

³ 17 Wend. 489.

⁴ Cayuga Co. Bank vs. Warden et. al; 1 Comst. 413.

ment on due presentment has been neglected or refused by the maker. Where a notice misdescribes the note in some particular, it may be shown in aid of the defect that there was no other note in existence to which the description contained in the notice could be applied.

A notice of protest need not in terms state that a demand has been made upon the maker. It is sufficient if it state that the note has been protested for non-payment.

An endorser of a note does not dispense with the necessity of presentment for payment, and notice of non-payment by taking from the maker security against his liability.¹

A note delivered by the maker without consideration therefor to a third person, to enable the latter to raise money thereon for the maker or himself, has no legal inception in his hands. If he negotiates the note upon a usurious consideration it is void.²

A notice of the non-payment of a note may be directed to the endorser in a village, where he has an office, for the transaction of his business, and is in the habit of receiving his letters, although he may reside in a neighboring village in which a post-office is located, where he receives some of his letters.³

In an action upon a negotiable promissory note payable to bearer, or *endorsed* in blank by the payee, possession of the note by the plaintiff is *prima facie* evidence that he is the owner of it for a good consideration, and evidence that the possessor did not obtain the note until after it became due, does not rebut such presumption. The case of *Brisbane vs. Pratt*, (4 Denio, 63,) commented upon, and its correctness questioned.⁴

A note made by C. and payable to N., or bearer, was, before maturity, offered to the plaintiff by N., in part payment for a horse. The plaintiff refused to receive it unless N. would endorse it, or guarantee the payment, or put his name to it, whereupon N. signed his name under C.'s, and delivered the note to the plaintiff. Held that he thereby

¹ 3 Kernan, 55.

² Catlin vs. Gunter, 1 Kernan, 868.

³ 3 Selden, 481, 486.

⁴ *James vs. Chalmers*, 2 Selden 209; 17 Barb. 230; 18 Barb. 344; 19 Barb. 147

made himself jointly and severally liable with C. as maker, and that an action could be maintained by the plaintiff against both.¹

The discounting of a new note, and the application of the proceeds realized from it to the payment of a former note, extinguishes the old debt and creates a new one.²

Creditors who have taken a new security in the shape of a promissory note, upon extending the time of payment of a debt, shall not, by an allegation of their own turpitude, set aside the new security and resort to the original indebtedness. Yet if the debtors themselves take the initiative in avoidance of the new note as being usurious, either by defence in a suit upon it alone, or in a suit upon the original security, the plaintiff may recover upon the original note.³

Where the date of a promissory note is left blank, the holder may fill up the blank with any date within the month named, without invalidating the note. All the parties to a note designed for circulation, are presumed to consent that the person to whom the same is entrusted for the purpose of raising the money, may fill up the blank date.⁴

One who writes his name upon the back of a non-negotiable note, may be held liable by the holder as guarantor or maker, and is not entitled to notice of demand or non-payment. The holder may use the endorser's name with a contract of guaranty, or as maker of the note.⁵

A note given to procure an officer to violate his official duty is against public policy, and void in the hands of the original payee, or any subsequent holder thereof, *with knowledge of its character*.⁶

The whole duty of the holder of a protested bill is discharged by notice to his immediate endorser, and all parties to the bill or note will be charged, if they receive notice in due course, from their immediate subsequent endorsers.⁷

¹ 19 Barb. 248.

² Fisher vs. Marvin, 47 Barb. 159; 9 N. Y. 463; 24 Wend. 115.

³ Winsted Bank vs. Webb and others, 46 Barb. 177; 5 Wend. 595, and cases cited.

⁴ Paige vs. Morrell, 3 Keyes, 117.

⁵ 40 N. Y. 491, 1 Keyes, 576, and cases cited.

⁶ 36 N. Y. 531, Devlin vs. Brady.

⁷ The West River Bank vs. I. B. Taylor, 34 N. Y. 128.

The holder of a promissory note, transferred in payment of a note already due, is a holder for value.¹

When a promissory note is not made payable at any particular place, generally, in order to charge the endorser, payment must be demanded of the maker at his place of residence or business. Yet there are various exceptions to this rule. If the maker has no known residence or place of business, the holder will be excused from making any demand whatever. So, if in the intermediate period between the time when the note was made, and when it became due, the maker has removed his domicile or place of business to another State, the holder will be excused for non-presentment for payment, and will be entitled to the same recourse against the endorsers as if there had been a due presentment. It will, in such a case, be sufficient to present the note at the maker's former residence or place of business.^{2 *}

The addition of the name of another person to a several note as maker, without the knowledge or consent of the original signer, is not such a material alteration as will avoid the note.³

The signature of a notary to a notice of protest need not be in writing, it is sufficient if it be printed.⁴

Of Guarantees.

A guaranty of payment endorsed on a promissory note though given at the time the note was made, and in order to afford additional security to the payee is not itself a promissory note.⁵

It is a special promise to answer for the debt or miscarriage of another person, within the language and spirit of the statute of frauds, (2 R. S. 135, § 2,) and to be valid must express the consideration on which it was made.

Where a debtor settles an account with his creditor, and

¹ 81 N. Y. 113.

⁴ 28 N. Y. 561.

² Adams vs. Leland, 80 N. Y. 309; ⁵ Hall vs. Farmer & Doolittle, 5

3 Denio, 145; 24 N. Y. 28.

Denio, 484, Beardsley Ch. J.

³ Brownell vs. Winnie, 29 N. Y. 400.

NOTE—Quere (?) whether he is obliged to make any demand in such cases. 24 N. Y. 28.

gives his note for the balance due payable on demand, and at the same time procures a third person to endorse on the back of the note a guaranty of the payment thereof, and delivers it with the note, such guaranty is void by the statute of frauds, unless a consideration be *expressed therein*. Such an undertaking is void, because it is founded upon no consideration in fact, there being no new advance nor any new credit given.¹

Where the payee and holder of a promissory note transferred it to his creditor in exchange for his own note, held by such creditor, and at the same time executed on the back of the note transferred a guaranty of the payment thereof, *held* that the guaranty was not within the statute of frauds, and was therefore valid *although it expressed no consideration*.²

Such an undertaking, although in form a promise to answer for the debt of another, is in substance an engagement to pay the guarantor's own debt in a particular way, and would be good without any writing. It falls within the third class of cases mentioned by Kent Ch. J., in *Leonard vs. Vredenburg* (8 J. R. 389,) where there is a new and distinct consideration moving between the parties to the new promise.

The terms of a guaranty must be strictly complied with, or the guarantor will not be bound. Thus, where J. being desirous of purchasing goods of the plaintiff on credit, procured a letter of guaranty from the defendant to the plaintiff, by which the defendant promised to be surety for the amount of the goods to be paid January 1, 1840, and the plaintiff sold the goods to J. and took his note payable December 25, 1839, *held*, that the defendant was not bound by his guaranty, although the plaintiff did not require payment from J. until after January 1, 1840.³

Where one contracts in the form of a guaranty upon the back of a promissory note, he cannot be made liable as endorser, nor can he set up in his defence the want of demand

¹ 2 Comst. R. 553, in *Court of Appeals*. ³ *Walrath vs. Thomson*, 2 Comstock, 185.

² *Brown vs. Curtiss*, 2 Comstock, 225, 533.

and notice. The mere neglect of the holder of a note to sue the maker does not discharge the guarantor, although the maker becomes insolvent.¹

A general letter of credit authorizes any person to whom it is presented to act upon the proposition therein contained, and where any person does act thereon, a contract arises between him and the maker of the instrument in the same manner as if it had been addressed to him by name.²

Where a note *not negotiable*, is endorsed by the payees generally, such endorsement does not amount to a guaranty.³

In such a case the payees may be treated as endorsers, and where that can be done, it seems the holder has no option to proceed against them as guarantors.⁴

In a suit upon a note thus endorsed against the makers and endorsers, presentment of the note by the owner, need not be averred.

An action will not lie upon such a note by the endorsee against the makers and endorsers jointly.

A guaranty that a demand is collectable is a conditional promise binding upon the guarantor only in case of diligence.⁵

After the guarantor of a note has been discharged by the laches of the holder, there is no moral obligation to pay it, and he cannot be again made liable, even upon an express promise.

A person who guarantees a note is in no sense a party to the note. A guaranty is a special contract and must be specially declared on. The law will not imply a contract of guaranty where the evidence shows that the defendant undertook to be bound as endorser. Where parties have agreed upon an express contract, the court will not imply one of a different legal effect and obligation.

A guaranty should be construed by the same rules that are applied in the construction of other instruments. The

¹ 2 Comstock, 225.

² Union Bk. vs. Coster's Executors,

3 Comstock, 203; 20 Wend. 184,
201; 24 Wend. 35; 4 Hill, 200.

³ White vs. Low, 7 Barbour, 204,
Hand J.

⁴ Id. This decision was made under
the Code. See Code, § 119, 167.

⁵ Vanderveer vs. Wright, 9 Barb.
547; 5 do. 501

leading rule is to ascertain from the written instrument the intention of the parties. The whole context of the instrument should be considered and applied to the transaction to which it relates, with a view of ascertaining the intention of the parties.¹

The following classes of contracts are, by a statute, ordinarily denominated the statute of frauds, required to be *in writing*, with the *consideration expressed*, and to be *subscribed by the party*, to be charged therewith, viz :

1. Every agreement that by its terms is not to be performed within one year from the making thereof.

2. Every special promise to answer for the debt, default or miscarriage of another.

3. Every agreement, promise or undertaking made upon consideration of marriage, except mutual promise to marry.²

4. Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands.³

Under the FIRST CLASS of the contracts mentioned in the preceding section, it is held that agreements which *may* be completed within a year are not included as an agreement to furnish materials and build a house within fifteen months, for the terms of the contract do not provide that it may not be done within the year.⁴ But where in January, 1841, one agreed to clear off a lot of wood land for another, so as to have it ready for a crop in the spring of 1842, and was to have for his labor the right of putting a crop upon it in the spring of 1842, it was held that the contract was void because the part of the agreement giving the contractor the use of the land for the crop to be put in in 1842, extended the period of its performance beyond one year. So an agreement to work two years for one hundred dollars, for the implied agreement is that the money is to be paid at the end of the two years.⁵ In order, however, to render the contract void, it must be, necessarily, incapable of performance within a year.⁶

1 The Farm. and Mech. Bk. vs. Evans, 4 Barb. 487. 4 15 Wend. 336.

5 2 Denio, 87.

2 2 R. S. 135, § 2, [4th ed. p. 317.] 6 13 Wend. 307.

3 2 R. S. 135, § 9, [4th ed. p. 316.]

Under the SECOND CLASS, promises to answer for the debt, default or miscarriage of another, it is held that in order to render the contract void, it must be one where the contractor becomes strictly a surety or guarantor, and not one where he enters into an original obligation to pay his own debt by paying an existing debt of another person, or by having it paid by another person previously indebted to him. Thus, where A. is indebted to B., and C. in consideration of one dollar paid to him by B., agrees that A. shall pay the debt, the case is one of guaranty, and the agreement must be in writing, having the consideration expressed and the signature of the contractor. But where A. promise B. upon a good consideration, that a stranger will pay a sum of money, or do any other act, this is an original undertaking and not within the statute, and it makes no difference whether the stranger is under an obligation to do the act or not. If A. sell and deliver his horse to B. upon a promise by the latter that C. will pay him one hundred dollars, the agreement is just as obligatory as it would have been had B. promised to pay the money himself, and in neither case is a writing essential. And if in such a case, B. deliver A. the note of C. for one hundred dollars, and agree that it shall be paid at maturity, or that it may be collected by due process of law, it is still an original undertaking and not within the statute.¹ So where C. holds the note of A., and purchases something of B., and in payment gives him the note and promises to see it paid ; or where C. was indebted to B. and gave to him the note in part payment, and promised to see it paid ; in these cases the contract is an original one and need not be in writing, or if in writing, need not express the consideration.² Upon the same doctrine, where the defendant owed J. S., and J. S. owed the plaintiff, and J. S. directed the defendant to pay the amount to the plaintiff, his verbal promise to the plaintiff to pay it was held good.²

The signature of sureties to an instrument so drawn as to express an obligation to pay on the part of the principal

¹ 4 Hill, 178; 2 Comst. 225.

² 8 Barn. and Cress. 842.

alone, is held an effectual promise within the statute, as a blank endorsement, or a signature to a promissory note.¹

Where, however, one writes to another that if he will let a third person have goods on credit he will see him paid, the consideration is sufficiently expressed, and it is held a good compliance with the statute.² Here, it will be seen the contract was in writing, signed by the contractor, and the consideration was expressed. But if the promise had been a verbal one, it would have been void. Thus, if I tell A. that if he will sell an article to B. upon credit I will see it paid, my contract is void, for it supposes a credit to B. which I guaranty. So if I tell him to sell goods to B. and charge it to us both, for here I become merely B.'s surety. If, however, I tell A. to sell goods to B. and I will see him paid, this is regarded as a sale to me and not to B., and the contract is good, for there is no debt against B.

It makes no difference in the rule that the guarantor has had property placed in his hands to indemnify him, and to pay the debt.³ The question in all these cases, is whether the contract is to pay one's own debt or the debt of another. Where there was an original debt, and the guarantor attempts to become a surety for it, or where he attempts to become jointly liable with another for a debt which he is about to contract, the agreement is within the statute, and must be in writing, expressing the consideration, and be signed.

Under the THIRD CLASS it has been held that an antenuptial agreement to support the daughter of the wife is void, unless in writing, expressing the consideration.⁴ The terms of the statute expressly extend it only to pay money or perform some act in consideration of the marriage. A promise contained in a letter, to give a certain fortune with one's daughter in marriage, is a sufficient contract within the statute.⁵

Under the FOURTH CLASS, verbal agreements to extend the time for performing a contract for the sale of land,⁶ for the

¹ 2 Hill. 663.

² 3 Comstock, 203.

³ 12 John. 291.

⁴ 11 Paige, 257.

⁵ Com. on Cont. 72 to 75.

⁶ 15 John. 200.

purchase of *growing* timber, grass or fruits,¹ and for the sale of a pew in a church, are within the statute and void. But a verbal lease for a term not exceeding a year, although it is to commence at a future day, has been upheld. So a contract to sell a growing crop may be made by parol. The reason of a different rule in the latter case from that where growing timber is sold, is that growing timber or grass being the natural products of the soil, are considered real estate, while cultivated crops are chattels, and neither lands nor real estate.

There is a variety of property attached to a freehold which is so fixed as to be in readiness to be severed, and capable of being separated from it without violence, which the courts hold may be sold without a written contract; such as ripe crops, mill-stones, gravel, buildings and fixtures. When the owner sells them as personal property, the law so regards them. But it must be a sale contemplating an immediate severance of them from the freehold in their present condition.²

The defendant wrote to the plaintiff, a dealer in leather, in behalf of M. E. McGee, a shoemaker, the following letter: "SIR—I will be responsible for what stock M. E. McGee has had, or may want hereafter, to the amount of five hundred dollars." *Held*, a continuing guaranty, and not exhausted by purchases of, and payments for stock to the amount mentioned.

Held, also, that it *expressed* the consideration within the requirements of the statute of frauds.³

A contract to guaranty the debt of a third person must be in writing, and express the consideration upon which it is made, or it will be void.

The consideration cannot be suppressed by parol proof.

A guaranty written beneath a promissory note of a third person, and delivered with it upon a previous agreement, is not a part of the note, and the guarantor is not a joint maker with the maker of the note. It is a distinct contract, and must comply with the requirements of the statute of frauds.

¹ 1 Barb. 548.

² 4 Kent's Com. 451.

³ 8 Kernan, 232, and many cases cited by Denio J.

The consideration of a guaranty may be the credit given to the principal debtor.

The expression in the contract, "for value received," would be a compliance with the statute. The cases of Leonard vs. Vreedenburgh, (8 John. 28,) Marrow vs. Durham, (3 Hill, 584,) Lequeer vs. Prosser, (1 Hill, 256,) and Oakley vs. Boorman, (21 Wend. 588,) commented upon and disapproved.¹

A contract to guaranty the payment of a promissory note, although made simultaneously with the note, and written upon the same paper, and upon a consideration advanced on the credit of the guarantor, conformably to a previous understanding, must *express* the consideration upon which it is made, or it will be void.²

In an action upon a guaranty indorsed upon a promissory note, it is not necessary to prove by witnesses the signature of the maker of the note. This is sufficiently proved as against the guarantor by proving his execution of the guaranty.

Where a guaranty is written upon a note, and the note is transferred, the sale and delivery of the note, with the guaranty upon it, furnishes *prima facie* evidence of a sale of the contract of guaranty.

And the possession of the note and the guaranty is *prima facie* evidence if a right in the holder to the guaranty, and will authorize him to maintain an action thereon, unless it be shown that the contract of guaranty was not transferred, and at the time the note was transferred.

When a guaranty is expressed to be "for value received," the consideration is sufficiently expressed to satisfy the requirements of the statute of frauds.³

One who guarantees the payment of a bond assigned by him thereby estops himself from denying in an action on the guaranty, that the makers of the bond were competent to contract in the manner they did.⁴

The sureties on a deputy sheriff's bond are not concluded

¹ Snow & Brewster vs. Silence, 4 Selden, 207, and cases cited. ³ Cooper vs. Dedrick, 22 Barb. 516.

² 20 Barb. R. 298; 25 Barb. 625.

⁴ Remsen vs. Graves, 41 N. Y. 471.

by a recovery against the sheriff where they had no opportunity to appear and defend.¹

The same on an administrator's bond.²

After a guarantor of rent has become fixed and liable for rent in arrear, such liability can only be discharged by payment, release or other satisfaction. It will not be discharged by a surrender by the lessees of the unexpired term, and the possession of the demised premises, without the knowledge or consent of the guarantor, upon an agreement that the lessor will release his claim for rent yet to accrue, but that such surrender shall not affect his claim for rent already due.³

A guaranty indorsed upon an agreement for the sale of goods, and bearing even date therewith, by which a third person promises as follows: "I will be responsible for all such goods as Mr. White shall buy of the Messrs. Church within one year from date, which shall not be paid for according to the terms of the within contract," *is void*, for want of a consideration expressed therein. The decision in *Brewster vs. Silence*, (11 Barb. 144; 4 Selden, 207,) reaffirmed and held to be the existing law, notwithstanding the case of the *Union Bank vs. Coster's Executors*, (3 Cow. 203.)⁴

Where a guaranty of a promissory note is a separate instrument from the note, title to it will pass by delivery, with the note for a good consideration. A written assignment is unnecessary. The transfer of the note guaranteed, and the delivery with it of the guaranty, carries with it the title to the guaranty without any written assignment.⁵

One who guarantees in writing the payment of a bond assigned by him, thereby estops himself from denying in an action on the guaranty that the makers of the bond were competent to contract in the manner they did, and that the instrument is a binding obligation upon the makers.⁶

A guaranty of the collection of the amount of a bond

¹ *Thomas vs. Hubbell*, 35 N. Y. 120. ⁵ *Gould vs. Ellory*, 39 Barb. 163; 9
² 35 N. Y. 256. Wend. 80; 23 Barb. 461.

³ *Kingsbury vs. Williams*, 53 Barb. ⁶ *Remsen vs. Graves*, 41 N. Y. 471;
 142, and cases cited. 15 N. Y. 502; 84 Barb. 208.

⁴ *Church and others vs. Brown*, 29
 Barb. 486.

and mortgage as it becomes due, is but an undertaking on the part of the guarantor that the debt will be paid, if the principal be prosecuted with *reasonable* diligence, and the former is discharged by want of such diligence on the part of the creditor to prosecute the principal debtor to judgment and execution.¹

Where the facts are undisputed, the question of what is reasonable diligence is a question of law for the court, and a delay of prosecution for six months after the debt has become due, where all the principals reside in the State, and can be personally served, is not a reasonable diligence, and discharges the guarantor.²

A contract to be accountable that B. will pay you for glass, paints, &c., which he may require in his business to the extent of \$50, is a continuous guaranty. The limitation is not of the credit to B., but of the extent of the guarantor's liability. The doctrine of *Gates vs. McKee*, (3 Kernan, 232,) reaffirmed.³

M. S. addressed a letter to S., introducing A. to him in the following words :

BROOKLYN, February 24, 1862.

DEAR SIR: This note will introduce to you Valentine Arnott, I spoke of to you on the 22d inst. He wishes to purchase some pure liquors on a credit of three months, for any amount not exceeding \$100. I consider him perfectly good, and if required will indorse for him to that amount.

To I. O. S., 10 Broadway.

M. S.

The liquors were sent upon this letter of recommendation. It was held :

1. That the letter was not in itself a guaranty to the plaintiff for the price of the goods sold to A.

2. That the guaranty was conditional, to be created if required, and thereby indorsement only.

3. That the defendant could not be made liable in any other form, until after a refusal by him to indorse A.'s note.⁴

¹ *Craig vs. Parkis*, 40 N. Y. 181.

² 3 Kernan, 232.

³ *Rindge vs. Judson*, 24 N. Y. 64.

⁴ *Stockbridge vs. Schoonmaker*, 45 Barb. 100; 16 John. 67.

*Of actions for damages for an injury to the person, to real property, and for taking, detaining, or injuring personal property, cognizable in Justices' Courts.*¹

Under the ancient system of pleading, the cases which are comprehended under this classification, found their remedies in actions of trespass, trespass on the case, detinue and replevin. Where an injury to one's person or property was a *direct* one, the appropriate action was trespass; where it was *in consequence* of the defendant's wrongful or negligent act, it was trespass on the case; where it was for unlawfully taking one's personal property, it was an action on the case called trover, or if the plaintiff wished to recover the property, replevin; and where for unlawfully detaining property, detinue or replevin. There were a great variety of rules of pleading and evidence peculiar to the different actions. With the abolition of the forms of action, most of these are superseded, and all the remedies furnished by each of the ancient forms, are now to be obtained by the "civil action."² In considering the injuries treated of in this chapter, the subdivisions indicated in their enumeration will be followed.

1. Actions for injuries to the person.

2. Actions for injuries to real property.

3. Actions for taking, detaining, or injuring personal property; and as many of the causes of action arising under each of these divisions, arise from the acts of persons acting under color of law or of legal process, in a further subdivision.

4. The rights and liabilities of persons acting under color of law or legal process, will be examined.

1. *Actions for Injuries to the Person.*—The exclusion from a Justice's jurisdiction of actions for assault and battery, false imprisonment, libel, slander, malicious prosecution and seduction, provided by the Code of Procedure,³ extends to all cases of wilful direct injury to the person, and

¹ Code of Procedure, § 53, s. 2; 4th ed. R. S. vol. 2, p. 488. ³ Code of Procedure, § 54.

² Code of Procedure, §§ 69, 64, sub. 15; 4th ed. R. S. vol. 2, p. 493, 491.

limits it to cases where the injury is a consequence of some wrongful or negligent act. Such act or negligence may be committed either by a defendant or his servant or agent. The general rule is, that where any one either personally or by his servant, does an illegal act, or a lawful one in such a negligent manner that it is likely to produce an injury to others, he is answerable to every person who is in consequence of it injured.¹

If, however, the plaintiff by his own negligence contributed at all to the accident, he cannot recover, unless the case was one of wilful or gross negligence. This is not tolerated, whatever may have been the plaintiff's negligence.² Thus the action may be maintained where an injury was received by being run against by the defendant in the highway in a dark night, the defendant being no otherwise blamable than by driving on the wrong side of the road. But where a child of such tender age as not to possess sufficient discretion to avoid danger, was permitted to run in the highway without an attendant, and was there run over by the carriage of a traveler and injured, an action was held not to lie by him against the traveler, without showing that the injury was voluntary or wilful. The child was negligent, and though incapable of knowing how to avoid the danger, was held bound by the same rule as an adult, if he exposed himself to it.³

Injuries for which damages may be recovered, may happen from accidents arising from a very slight degree of negligence, as well as from those where there has been a gross disregard of the rights of others; as the injury from being run against in the highway in the night, occasioned by the defendant's driving on the wrong side of the road;⁴ where the defendant drove a high spirited horse which he could not control, and it ran against the plaintiff, or where the injury was occasioned by carelessly pulling the wrong rein in driving, or by fastening his horse by an insufficient halter, which

¹ 14 John. 432; 4 Denio, 464.

³ 21 Wend. 615; 6 Hill, 592.

² 21 Wend. 188; 6 Hill, 592; 3 Kernan, 9; 2 Id. 425; 1 Id. 432; 4 Selden, 175-222; 3 Id. 493, and cases cited.

⁴ 14 John. 432.

he broke; the unskilfully building a wall which fell and injured the plaintiff; or the digging a pit in the highway into which the plaintiff fell.

If the injury happen from unavoidable accident, neither party is responsible for it. It is, therefore, necessary for the plaintiff to show that there was negligence on the part of the defendant, and then if it appear that the plaintiff by his negligence contributed even slightly to the injury, the defendant is entitled to a judgment.

The injuries may also arise from the negligence of one's servants or agents engaged in the transaction of his business. In this case, the action may be brought against the principal and his agent, or the master and his servant jointly.¹ It is otherwise, however, if the injury were occasioned by the agent's or servant's wilful act, excepting in the case of injuries to passengers in a carriage kept by a common carrier of passengers. In the latter case, the owner of the carriage is responsible for the wrongful acts of his servants by which his passengers may suffer.²

It has been remarked that one is liable for injuries sustained by the negligence of his servant. Thus, if a servant in the course of his master's business, negligently drive his cart against the carriage of another person, by which he is injured, or if he obstructs the highway by which a traveler sustains an injury, the master is liable.³

The question which governs the liability is, whether the act was one which the servant can justify to his master. Thus, in an action against the master for an injury occasioned by the obstruction of a highway by a pile of wood, laid there by his servant where it appeared that the master had been accustomed to lay his wood for several years, and that the servant while he was sick, and without his knowledge, had placed it there, it was held that this was an act in the course of his business as a servant, and the action was sustained.⁴ In such a case, if the wood pile had been placed

¹ 1 Cowen, 109; 6 Cowen, 571; 19 Wend. 343. ³ 6 Cowen, 189.

² 1 R. S. 696, § 6, [4th ed. vol. 2, p. 105.] 19 Wend. 343.

⁴ Id.

on the defendant's land, within the road fences, but not within the true lines of the highway, the act would have been excused. The owner need not fence up to the boundary of the highway; and if he does not, he may place an obstruction without his fences and out of the road, without being liable to another for an injury in consequence of it.

The liability for injuries arising from the negligence of servants and agents, extends to the acts of subordinate persons employed by the agents for a party in any of his business which requires their services. Thus, where one employs another to build a chimney, and he lays lime in the highway, by which a carriage is overturned and an injury ensues, the employer is liable. So, where the owner of a farm employs an agent to work it for him, and he employs servants who are paid from the funds of the principal, the principal and not the agent is responsible for any injury sustained by their negligence or want of skill. In these cases there is an implied authority in the agent to employ the subordinate agents,¹ and he is not responsible for their negligence.²

Wherever a master becomes liable for an injury sustained in consequence of his servant's negligence, he can maintain an action over against him for the damages he is compelled to pay in consequence of it.³

It is provided by statute that whenever any persons traveling with carriages shall meet upon a public road, they shall seasonably turn their carriages to the right of the centre of the road, so as to permit them to pass without interference or interruption.⁴ The term carriages includes all classes of vehicles used for the transportation of persons and property. The right of the *centre of the road* is held to mean the right of the centre of the *worked* part of the road; although the whole of the smooth or *most traveled* path may be on one side of the centre. The traveler should therefore in passing, keep the right of the centre of the worked part, although the traveled path lie entirely on the left of that centre, so as to render it necessary for him to

¹ 5 Barn. & Cress. 547.

² 6 Term, 411.

³ Reeve's Dom. Rel. 377.

⁴ 1 R. S. 695, § 1. [4th ed. vol. 2, p. 104.]

turn completely to the right of it and leave it entirely to the person he is meeting. And it is held to be no defence to an action for collision, that he attempted to prevent it; that the road on his side was rough and rutty, and that it was more difficult for him than for the other party to turn out. Unless the obstacles to turning out are insuperable or extremely difficult, he is without excuse.¹

But the rule requiring persons meeting each other on any turnpike road or public highway, to keep their vehicles to the right of the centre of the worked part of the road, does not apply to the winter season, when the depth of the snow renders it impossible or difficult to ascertain the centre of the worked part of the road.

It is a reasonable construction of the statute to define the centre of the road when obscured by snow, to be the centre of the beaten or traveled track, without reference to the worked part.²

Within the rule governing in the cases of injuries by negligence, and the law of the road as provided by the statute, where a collision happens upon a highway, it would in ordinary cases be sufficient to show that the plaintiff was on the right side of the road, and that the defendant drove against him. This would fix negligence upon the defendant; for he could not insist that the collision was unavoidable, which he might have prevented by keeping on his own side of the road. Yet if the street is sufficiently wide, although the defendant were on the wrong side of it, the plaintiff would not be justified in crossing over to it and interfering with him, merely because the law authorized him to drive upon that side; and if in consequence of his doing so, the defendant unintentionally ran into his carriage or against him, the plaintiff would have contributed by his negligence to the injury, and would be entitled to no damages against the defendant.³ It is, therefore, held that the rule of the road is not to be held strictly, where by departing from it injury can be avoided. *Prima facie*, the party on the wrong side of the road is liable, but if it be shown that the party

¹ 7 Wend. 185; 17 Barb. 94.

² 8 Esp. 685; Id. 44; Id. 273.

³ 12 Barb. 613, Hubbard J.

on the right side might easily and conveniently avoid the collision, he will be without remedy for the injury he has sustained.¹

The same rule which prevails in relation to injuries by collisions upon the road, prevails in relation to injuries sustained by vessels running foul of each other, with this modification. If the collision is occasioned by the carelessness of the person injured, or if he in any degree contributed to it, he cannot recover from the other. If a passenger is injured by the negligent act of the persons navigating both vessels, he could bring his action against both or either of them.

The injury may arise from an act committed in violation of law, but without an intention to injure any one, as where one placed a pile of wood or other obstruction in the highway by means of which the plaintiff was injured.² If, however, the obstruction is in such a position as to be plainly visible and easily avoided, if one in the day time carelessly drive into it and is injured, it is his own fault.³ And if the highway was one claimed, not by having been laid out, but by user alone, and was in fact but two and a half rods wide, and it being questionable whether the wood was actually within the road as established by the use, it was held properly left to a jury to determine whether or not the wood was in the highway, for all the land within a highway fence is not necessarily subject to the right of way, and when it is not, it may be occupied by the owner, and if he place an obstruction there, he is not liable for an injury which another sustains by running against it.⁴

One is liable for injuries to the person arising from negligence in the keeping and care of domestic animals. If he keep an animal naturally wild or ferocious, and it escapes and injures any person, he is responsible for it.⁵ He is not, however, answerable for injuries to the person of another committed by domestic animals, as horses, cattle, dogs and the like, unless he has had notice that they had previously

¹ 3 Car. & Payne, 554.

² 6 Cowen, 189.

³ 11 East, 60.

⁴ 6 Cowen, 189.

⁵ 2 Ld. Ray. 1588.

attacked persons.¹ If, however, he knows that his bull has attacked a man, he is answerable for any injury which he afterwards does, or if he knew that his dog had bitten mankind, an action will lie if the dog bite one, though he carelessly trod upon his toes.² The owner's knowledge of the animal having previously committed a similar injury, must be shown, but it may be by circumstantial evidence. Where one was severely bitten by a dog, and the owner promised to make her a pecuniary recompense, but there was no proof that the dog had previously bitten any one, the court held the circumstances were not sufficient to authorize a jury to infer the knowledge.³ Proof that the defendant had warned a person to beware of the dog lest he should be bitten in one case, and in another that there was a report that the dog had bitten, and that his master had thereupon tied him up, was submitted to the jury upon which to find whether the owner knew of the dog being accustomed to bite.⁴

Where the injury is sustained from an animal known by the owner to be vicious, he will be liable, although he has undertaken to secure it, if the means employed were not effectual.⁵

Every man may keep a dog for the protection of his house and property, and may cautiously use him for that purpose, and if any one go into his yard at night after the dog is properly let loose, if he is bitten no action will lie.⁶ So if he is bitten in consequence of being on the land of the owner of the dog where he is not entitled to go. But if he have no means of knowing the danger and is not otherwise in fault, he may recover, although the owner had set up a notice warning people of the danger, which he being illiterate, cannot read.⁷ And where the defendant knowingly permitted to be at large upon his premises a ferocious dog, which would worry persons passing over his fields in the daytime, although technically trespassers, he was held liable for the injury committed by him upon a person so trespassing.⁸

¹ 1 Comst. 515; 4 Denio, 127.

² Str. 1264; 18 John. 339.

³ 4 Camp. 198.

⁴ 1 Stark. 285; 2 Esp. 433.

⁵ 3 Car. & Payne, 138.

⁶ 1 Esp. 203.

⁷ 4 Car. & Payne, 297.

⁸ 17 Wend. 496.

Where, in an action to recover damages for alleged injuries to the plaintiff's dog, inflicted by the defendant's dog, it is immaterial to show the character and habits of the defendant's dog, the plaintiff must prove that the defendant's dog was the aggressor in that particular fight. If the plaintiff's dog provoked the quarrel and caused the fight, the defendant, as the owner of the other dog, cannot be made responsible for the consequences.

The cases in which dogs have attacked human beings, although trespassers, and their owners have been held liable, are not applicable to the case of one dog attacking another.

A distinction is to be observed between keeping a dog which is dangerous to human life, and one that is unwilling to have strange dogs upon his master's premises, and is in the habit of attacking them and driving them off.

Owners of valuable dogs are bound to take care of them and to keep them within their own precincts or under their own eye, as the rule is not general that when two dogs fight and one is killed, the owner can recover damages for his loss from the owners of the victorious dog.¹

Two dogs of unequal size, owned by different persons, in company killed sheep of the value of \$19, and the jury in an action against the owner of the larger dog found a verdict against him for \$12 damages. *Held*, that the jury had the right to say the larger dog did more damage than the smaller one, and that their apportionment of the damages could not be shown to be incorrect, and was therefore conclusive.²

The defendant's dog was identified as one of the two that killed the sheep by witnesses acquainted with it, who only heard it bark in the lot where the sheep were killed in the night without seeing it. *Held*, that it was a question for the jury to determine whether the dog had such a peculiar bark, that witnesses acquainted with the animal, could identify it by only hearing it bark.³

To hold the owner of a dog liable for an injury committed

¹ 22 Barb. 650.

³ 18 Wend. 141.

² Wilber vs. Hubbard, 85 Barb. 803.

by him, it must appear that the dog was vicious, and the owner knew it, or that he was a trespasser at the time of doing the injury.¹

If an individual knows that his dog is in the habit of following teams driven by such person, and of watching them after they are hitched and left by him, and if he knows that such dog is accustomed to attack and bite strangers approaching teams so watched, he is liable for any injury done by the dog to a person lawfully approaching the team for the purpose of unhitching it. A man owning such a dog must secure it at home, so that it will not follow him.

Where a dog which has the vicious habit of attacking and biting other dogs, without being incited to do so, is suffered to go at large, and he attacks and kills the dog of a person lawfully coming upon the premises where he is, his owner is liable in damages for the value of the dog so killed, where it is shown that such owner had knowledge of the viciousness of his dog.²

A dog which is accustomed to attack and bite other dogs, without being incited to do so, is a vicious animal, whether it has been trained to such habits or not. Vicious dogs are a nuisance, and their owners must either kill or confine them, or answer in damages for injuries inflicted by them.

Dogs in general have no fixed or general market value. If there is any particular breed or class of dogs which is generally or usually sold in market, and have established some fixed or general market value, opinions of witnesses are as competent to fix the value of such breed or class, as of any other marketable property.³

In order to render opinions as to the value of a dog competent evidence should be first shown that the dog in question is a marketable animal. Opinions as to value, founded on mere taste or fancy of the owner, or the witnesses are not competent.⁴

¹ Fairchild vs. Bentley, 30 Barb. 147.

² Wheeler vs. Bryant, 28 Barb. 324.

³ Brown vs. Hoberger, 52 Barb. 15.

⁴ 17 Barb. 561, overruling the decision in 23 Wend. 854.

The killing of a dog while in the act of chasing and worrying sheep being a justifiable act, no recovery can be had.

Every person *in possession of any dog*, or who shall suffer any dog to remain about his house for twenty days previous to the injury of the sheep by such dog, shall be deemed the owner of the dog for all the purposes of this title.

In order to maintain an action under this statute, where the defendant denies that he is the owner of the dog, the plaintiff must prove that the defendant had the possession, or suffered the dog to remain about his house for twenty days previous to the injury to the sheep.¹

An injury to one's person is sustained when his health or comfort is impaired by any private nuisance, or any unwholesome, noisome or offensive erection made by another, as a mill-pond which generates unwholesome odors, a hog-pen, slaughter-house, tannery, or other building where business is conducted which disagreeably infects the air of the neighborhood. And the action may be brought against the party erecting it, or any one who continues to use it.² It cannot, however, be maintained against the person who maintains it until after a request to remove it, although it may against the party erecting it.³ To maintain the action, the nuisance must affect the plaintiff. A public nuisance, where the injury is common to all the citizens of the State, as an obstruction in a highway, or a navigable river, will not warrant it, unless the plaintiff has been actually injured by it. But if he falls over it by which his leg is broken, or he be otherwise injured, the action will lie.

There are a variety of cases where a man is injured in the character of husband, father or master, as where on ac-

¹ Strong vs. Newlin, 38 How. 364; ² 5 Coke, 100, 101; Willes, 583; 10 R. S. 4th ed. 112; 1 Denio, 500. Mass. 72.

³ See 7 Cowen, 609, 611.

count of the negligent acts of another, his wife, child or servant is hurt, where they are enticed away from him, or where one has criminal intercourse with his wife, or seduces his daughter or servant. The law affords a remedy in all these cases, but it is not always within the jurisdiction of a Justice. His jurisdiction, for this class of cases, is limited to actions "*for an injury to the person*," which is not "an assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction."¹ Actions for criminal intercourse with one's wife, daughter or servant, are excluded. In the cases, however, where a wife, child, or servant is injured by the negligence of another, as by an accident occasioned from his carelessness or inattention, or by the unskilfulness and negligence of a physician or surgeon, the injuries are *to the person*, although not to the person of the husband, father or master, and not within the exceptions of assaults and batteries contained in the fifty-fourth section of the Code of Procedure. They would seem, therefore, to be within the jurisdiction of a Justice of the Peace, though in most cases, it would be better to bring the action in a court having general jurisdiction, or to bring it in the name of the person actually injured.² If the party injured be an infant, the action may be brought in his name as well as if he were an adult.³

Enticing a wife from her husband, or a child or servant from its father or master is a good cause of action, unless where in the case of a wife, it be done by a near relative, as her father, and for good reasons.⁴ In a case where the father of one's wife induced her to leave her husband, the presumption is that he had good cause for doing it until

¹ Code of Procedure, § 53, sub. 2 and § 54, sub. 3; 4th ed. R. S. vol. 2, p. 488.

² A Surgeon is liable to an action for negligence in unskilfully performing an operation on the plaintiff's wife, notwithstanding she died dur-

ing it. 2 Root, 90; 1 Camp. 493; such cases, it is supposed, would rarely be brought in a Justice's Court.

³ 21 Wend. 615.

⁴ Reeve's Dom. Rel. 376; 1 Black. 378.

unworthy motives are shown.¹ And where a defendant permitted his wife's mother to live with him, although forbidden to by her husband, but without having enticed her away, and not opposing the husband in his attempts to reclaim her, an action was held not to lie.² It may be doubted whether the jurisdiction of a Justice of the Peace extends to this class of cases. They are strictly "*injuries to the person*," although they are calculated to inflict severe mental suffering, and whenever they occur without a good excuse, the damages of the suffering party may be safely estimated at a sufficient sum to warrant an action in a court of general jurisdiction.

Prior to the adoption of the Code of Procedure, where one beat the minor child or apprentice³ of another, so that the latter suffered a loss of its service, or was put to expense in having it cured, he might maintain an action before a Justice of the Peace for the *loss of service and expense* to which he was subjected, though the action for the direct injury to the child was an assault and battery, and not within the Justice's jurisdiction.⁴ The language of the Code seems, however, to exclude the action of the father for his loss of service and expenses, as well as that of the child for his injuries. The former can hardly be called an action for *injury to the person*, although it is for a pecuniary loss in consequence of an injury to the person of the child. And it is clearly not one for "injuring personal property."⁵

¹ 5 John. 196.

² 3 Mass. 317.

³ Cro. Jac. 618.

⁴ 1 Esp. 217; Reeve's Dom. Rel. 375, 376.

⁵ Code of Procedure § 53, sub. 2; 4th ed. R. S. vol. 2, p. 488. It may be useful in connection with the text, to embody here a condensed abstract of the general principles of law which relate to the corporeal punishment of minor children, apprentices and pupils in schools, laid down in Reeve's Domestic Relations, p. 374. A parent has the right to inflict moderate corporeal punishment upon his child under full age, for disobedience to his lawful commands, negligence in his business; or insolent behavior. A master has the same authority over his apprentices and menial servants, to whom he stands in the place of a parent, but not to servants of full age, although members of his family. In ordinary cases, the master's wife does not possess the right, but if the servant is so young that the principal care over him is devolved upon her, the duty of punishing him for improper behavior belongs

2. *Actions for Injuries to Real Property.*—This class of actions may be maintained for any injuries which may be committed to real estate, whether direct or consequential.

I shall discuss this branch of the law with particular reference to its application in a *Justices' Court*.

This remedy, in its application to injuries to real property, may be considered with reference—

- 1st. To the *nature* of the property affected ;
- 2d. To the plaintiff's right thereto ; and
- 3d. To the nature of the *injury*, and by whom committed.

The gist of this action is, the injury to the possession, and the rule is, that unless at the time the injury was committed, the plaintiff was in *actual possession*, trespass cannot be supported.

The plaintiff in a Justices' Court cannot litigate any other question of title, except *the question* of actual possession at the time of the alleged injury ; and although the question may be litigated in a Justices' Court, yet it does not deprive the Justice of jurisdiction on the ground that the title to lands comes in question.¹

The Legislature have provided, that if it appear on the trial, from the plaintiff's own showing, that the title to lands is in question, which title shall be *disputed* by the defendant, the Justice shall dismiss the cause, and the plaintiff shall pay the costs.²

The Supreme Court have decided, that though the plaintiff in a Justices' Court give evidence of title to lands, the Justice is not *bound* to dismiss the cause unless such title be *disputed* by the defendant.³

The term *real property* used in the statute is synonymous

to her. The right of punishing a servant is personal, and cannot be delegated by either master or mistress. A schoolmaster in his own right, and not by delegation of the parent, possesses the same power to punish his pupil for improper conduct while under his care, that the parent does over his child. 9 Co. 76; 1 Ld. Ray. 310; Str. 953; Cro. Jack. 630. In each of these cases, the party is not answerable, unless the punishment is so disproportionate to the offence as to indicate a bad temper or bad intention in its infliction. See 1 Sid. 125, 177; Cro. Car. 197; 1 Vent. 70; Cro. Jack. 865; 8 Mod. 120; Ld. Ray. 360; 3 Bur. 566; 1 Bl. 428.

¹ 6 Hill, 537, Beardsley J.

² 2 R. S. 168, § 63.

³ Adams vs. Beach, 6 Hill, 271, Nelson Ch. J.; 6 Hill, 44, Cowen J.

with *land*, and comprehends in its meaning any portion of the surface of the earth, whether covered with water or not, together with all buildings and erections thereon,¹ excepting such erections for the purposes of trade as are temporarily attached thereto. The spontaneous growth of the soil, as grass, trees and fruits while growing, and before they are severed from it, are parcel of the real property, though crops of grain or vegetables which are sown or planted from year to year, are, while growing, the personal property of the owner.² Fences, and rails used as fences, although temporarily removed from their places, are part of the land, excepting where put up by a tenant under an agreement with the owner that he may remove them.³ In like manner manure, whether scattered on land or lying in heaps, constitutes a part of it.⁴ But trees and plants raised for sale by a nurseryman upon premises leased by him for a nursery, are regarded as personal property, removable by him during his term.

Within the definition given in the preceding paragraph, all water privileges, together with the right of flowing adjoining lands appurtenant to any lands of the owner, are real property, injuries to which are the subject of actions in the Court of a Justice of the Peace.

The owner of land lying upon a highway or stream not navigable from the ocean, is presumed to own to the centre of the highway or stream, until the contrary appear.⁵ Where his deed bounds his lands "*along the highway or stream*," or "*upon it*," its legal effect is to grant to the centre. So where the boundary line runs "*to the highway or stream*," it is understood to go to its centre.⁶ If, however, the boundary is upon the north or other line of the highway,⁷ or the north or other bank of a stream, or where a boundary line runs to a tree or a stake on the north or other bank, and thence along the said bank, the whole of the highway or stream is excluded from the grant.⁸ The land within the highway re-

¹ Co. Lit. 42; 4 Bl. Com. 18.

⁵ 12 John. 252; 6 Cowen, 518, 579.

² 8 Wend. 584; 1 Barb. 542; 2 Id. 613.

⁶ 15 John. 447.

³ 2 Hill, 142; 1 Comst. 564.

⁷ 2 Id.; 6 Barb. 284.

⁴ 7 Barb. 263; 2 Hill, 142; 15 Wend.

⁸ 4 Hill, 369; 5 Denio, 599.

mains the property of the original owner, subject only to the use of the public for the purposes of a highway, and the owner may maintain an action for any exclusive appropriation of the soil or use of it inconsistent with such purposes.¹

Every man's land is in law surrounded by an imaginary fence or close, and every entry upon it without the owner's leave is technically termed *breaking his close*, and the law implies some damage from every breach, whether it be merely stepping upon the land or standing off from it and doing some particular injury to it, or anything growing from or affixed to it so as to constitute a part of it.²

The leave or license of the owner to enter upon his real estate may be expressly given or implied from his acts or implied from his acts or custom. *Express* leave is given whenever the owner invites any one or the public generally to come upon his premises or consents to the entry. Of this description of leave is the invitation which a tavern-keeper, or a dealer in merchandise, by his public sign holds out to all persons desiring to deal with him to enter his inn or shop. *Implied* leave arises where from the familiar intercourse of one neighbor with another, he habitually enters upon his land, or into his house for friendly intercourse; where the neighbors are in the habit of going to the plaintiff's well or spring to fetch water; where neighbors and strangers go into his lands to view a curiosity, to drink at a mineral spring; or where the public are in the habit of using a way or path which the plaintiff has left open for them. In such, and a vast variety of similar cases, the consent of the owner of the soil is presumed from the acknowledged rules of friendly intercourse and good neighborhood.

A license, whether express or implied, may at any time be revoked by the owner of the freehold, unless it were made upon such valuable consideration as to be sustainable as a contract. And when revoked, any attempt to exercise it after notice of the revocation, constitutes a wrongful entry. Where the license was to an individual, the notice of revocation should be given to him. If to the public, it should

¹ 2 John. 357; 15 Id. 447, 483. See 2 8 Bl. Com. 209, 210; 19 John. 885.

7 Barb. 297, and 4 Id. 56.

be given with sufficient publicity to afford reasonable information that it was withdrawn.¹ Where, however, there is a parol license to erect upon one's own land a building affecting injuriously the light or air of the party giving it, he cannot after the building is erected revoke it. The license is a direct encouragement to expend money, and it is against conscience to revoke it after the expenditure becomes beneficial. Such a license is not within the statute of frauds.²

A license to one man to enter or cross my grounds gives him no authority to take another with him. But if I authorize him to enter and do certain acts, as to cut down trees, dig clay, &c., he may take with him such tools, cattle and servants, as are needful to do it.³ And in general a license implies an authority to do every thing necessary to perform the act licensed.⁴

An agreement for the sale of land does not of itself license the person receiving it to enter upon it,⁵ nor does an express license to enter, imply a right to cut and consume timber. Much less would a contract to sell and convey land upon the performance of certain future conditions by the purchaser, give him a right to enter or cut timber before he has complied with them. Neither does an agreement made with one of several purchasers that until all of them had executed the contract of purchase, and a certain bond for the performance of its covenants, "no timber should be cut on the lot," imply a license to the purchasers after the contract and bond are executed to commit waste by cutting and carrying away the timber. The most that can be implied from such a contract is a permission to the purchaser to enter in the meantime as a tenant at will, and occupy the land in such reasonable manner as tenants at will lawfully may.⁶

A tenant at will is one who occupies the land of another by his consent, when no terms of a lease have been agreed upon,⁷ or where one has leased lands for one or more years,

¹ 10 John. 246.

² 3 Kent's Com. 452.

³ Jac. Law Dic. tit. License.

⁴ Wiles, 194.

⁵ 9 John. 35, 331; 7 Cowen, 229.

⁶ 9 John. 35, 331.

⁷ 2 Caines, 169.

and after the expiration of the term, the tenant remains in possession. In the latter case, he is also termed a tenant from year to year.¹ Such a tenant is not authorized to cut timber.²

A license to enter a house with a key will not justify an entrance in a manner by which it is left in an exposed condition. A tenant being desirous to sublet his house, left it locked, with authority to his landlord to let it if an opportunity offered, and for that purpose deposited the key with his neighbor. An opportunity to let the house occurred, but the person having the key having absconded, the landlord entered by placing a ladder against the house, and raising the first floor window, when after showing the house, he left it in the same state as before. The house was afterwards entered by persons unknown and furniture taken from it. The tenant having brought an action against the landlord for breaking and entering the house and leaving it insecure, in consequence of which his property was stolen, it was held that the entry by the window was without license.³

A license to enter upon lands is given by law in a great variety of cases; as to execute legal process issuing from any of the courts: to a landlord or reversioner to see that his tenant does no waste and keeps the premises according to his duty or covenants: to a creditor to demand or request money due or payable there; to any person entering an inn or tavern to get refreshment,⁴ to one making a lease excepting the trees, to enter and show them to a purchaser,⁵ to a purchaser of a tree, a crop, a horse, or any other article upon the premises of the vendor, to go upon them to take it away.⁶ But the rule in the latter case is confined to an entry to take chattels which were sold to him upon the premises by their owner. It does not authorize one to enter upon another's lands to take away his own chattel not purchased there.⁷

Under the ancient system of pleading, a distinction was

¹ 5 How. Pr. 81.

² 4 9 John. 35, 331.

³ 2 Dowl & Ry1. 714.

⁴ 3 Bl. Com. 212.

⁵ 10 Co. 46.

⁶ Bac. Ab. Trespass f.; 11 East, 366.

⁷ 6 John. 5; 14 Id. 406.

made between the unlawful or wrongful act of one who had entered upon real estate by express license of the owner, or by license from the act of the law. In the former case, his wrongful acts rendered him liable in an action of trespass upon the case, but did not constitute him a trespasser from the beginning. In the latter case, although his entry were lawful, yet if he abused his authority, his original entry was deemed unlawful, or in technical language, he became a trespasser *ab initio*.¹ The change effected by the Code of Procedure has rendered the distinction obsolete. The wrongful act is now the subject of the action whether the entry was under permission of the party or the authority of law, or without either.

If, therefore, one who enters a tavern behave with rudeness, or one who comes upon premises with legal process, or to demand a debt payable there, commit any excess, as to break doors, assault the occupants of the house, or any similar act, he is equally liable for the act, as if he had not been authorized in the first place to enter. But the mere intention to do an unlawful act, where the intention is not carried into effect, will not warrant a recovery. Thus, where one distrained a horse doing damage, and was leading it towards a pound, with intent there to impound it before he had applied to the fence viewers to appraise his damages, and the owner undertook to prevent him by force, it was held that the distrainer was not a trespasser from the beginning.²

The entry upon another's lands to warrant an action, must be with some degree of fault, for if I, as I lawfully may, with my dog drive my neighbor's cattle off from my land, and the dog follows them just into his land from which I call him as soon as possible, I am in no fault whatever, and an action will not lie.³ But if there is any neglect, although the injury be slight, the action will lie, as where one in cutting the grass in his own field, carelessly cut over the line, and by mistake mowed a little of his neighbor's,⁴ or where in removing obstructions from a highway, he carelessly or

¹ 13 John. 414; 5 Wend. 506; 5 ³ Poph. 160.

Denio, 319.

⁴ 3 Lev. 37.

² 20 John. 427.

unnecessarily injured his neighbor's crops, fences or buildings.¹

When a highway is impassable, one may of necessity pass over the adjoining lands, and when founderaus he may remove a fence to pass around the obstruction.² It is otherwise, however, if the road is his private one, for it is his own fault if it is not kept in repair.³

Where the defendant ascended in a balloon, which descended into the plaintiff's garden, and the defendant becoming entangled in it, and in a perilous condition called for help, and a crowd came to his assistance, treading down the garden, it was held that the defendant was answerable for the injury.⁴

The action may be brought by the tenant in possession, if the injury is done to the crops or fixtures, or to any portion of the premises in which he has the property, and in this case he may maintain his action against the owner of the land, for so far as all his interest is concerned the close is his.⁵ It may in like manner, where one has acquired a right to the crops alone, or to dig gravel or clay, for the law judges such person in actual possession so far of the land.⁶ But where the injury is to the reversion, as when timber is cut, or other acts of waste committed, which damage the owner of the estate, the reversioner may bring his action,⁷ and where the injury is to crops growing upon a farm worked by the tenant upon shares, the landlord and tenant should unite in the action.⁸

Inasmuch as a Justice of the Peace has no jurisdiction of an action where the title to real property shall come in question,⁹ the plaintiff in an action for injury to real property can only show his possession in order to maintain his action. This is usually shown by his fencing, cultivating or otherwise improving it, or performing any ordinary acts of ownership over it, as by using it for a wood lot.¹⁰ And it is not

¹ 7 Conn. 125.

² 7 Barb. 309.

³ 2 Show. 28; Doug. 716.

⁴ 19 John. 381.

⁵ 9 John. 108; 9 Cowen, 39, 48.

⁶ 9 John. 108, 143.

⁷ 1 R. S. 650, § 8. [4th ed. vol. 2, p. 156.]

⁸ 8 John. 216.

⁹ Code of Procedure, § 54, subd. 2, [4th ed. R. S. vol. 2 p. 488.]

¹⁰ 14 Wend. 239.

necessary that every part of it be inclosed. The actual occupancy of a part of a farm, a portion of which only is inclosed with a claim of title to the whole, is sufficient to show possession of the whole.¹ The plaintiff may show his own acts and declarations at the time of his entry, and his deed, in order to determine the extent of his claim of possession, as well as his acts of ownership. And this would not be the involving of a question of title within the statute, but merely the establishing of his possessory right. The deed, it is true, might be used as evidence of title, but in such a case it may be used as evidence of possession.

Where land is unoccupied, so that no actual possession can be proved, the person holding the legal title is deemed to be in possession so as to maintain an action for an injury to it.² So where a tenant at will commits voluntary waste, as by cutting timber, the waste terminates the tenancy, and the owner may bring his action against him.³

The possession of land occupied by a highway, is in the owner subject to the use of the public for traveling, and he may maintain an action against any one who appropriates any portion of it for any other purpose, or who cuts timber upon it or digs into it. By the act of laying out the highway, the public acquire the right of preparing it for traveling and using it for that purpose. In doing this, the public authorities may use the timber growing in it, which may be requisite to repair it and the bridges upon it.⁴ Subject to this, every other right in it belongs to the owner as exclusively as before. The qualified possession which the corporation of a city or village have in the streets, is not sufficient to sustain an action by them for an injury to it as to their real estate.⁵ But the trustees of a religious society, whether incorporated or not, have sufficient possession of their church to maintain an action for an injury to it.⁶

Where a lease is for a fixed term, the tenant is not entitled

¹ 1 Caines, 358; 12 John. 452; Code, § 7 John. 1; 9 Id. 35.

§ 82; 5 Denio, 415; 7 Barb. 92.

² 12 John. 183; 10 Wend. 639; 8

Term, 72; 14 East. 249; 6 Id. 154; 5 1 Blackf. 88.

1 Id. 244; Str. 1238; 5 Bing. 7.

⁴ 1 R. S. 525, § 126, [4th ed. p. 1055,

§ 153.]

⁵ 1 Blackf. 88.

⁶ 9 Wend. 414.

to crops growing and not harvested at the end of his term, although they were sowed or planted by him. If, however, the lease is for the life of a person, or terminable upon any uncertain event, as the will of the landlord, the tenant is entitled to any crop which he has sowed or planted, before the happening of the event which puts an end to his lease.¹

The owner of a leasehold interest in lands with buildings may recover his damages for the negligent destruction of the buildings. And if he erect buildings upon the land, although in an exposed and hazardous situation, from the existing use of the adjoining lands, he is not chargeable with negligence within the rule, that if the plaintiff's negligence concurs in producing the injury, he may not recover. Where the plaintiff builds near a smithy, or on the track of a railroad, or near the usual course of a steamboat, he may recover for its loss by fire occasioned by the negligence of the smith, or the servants of the railroad, or steamboat companies.²

Every owner of land has a right to use it in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lot. I can, therefore, maintain an action against my neighbor, who digs a pit on his own land so near mine, that it causes my soil to fall into it. But he has a right to dig a pit on his own land, if necessary to its convenient use, where it can be done without injury to mine in its natural state, and I cannot deprive him of this right by erecting a building on my lot, the weight of which will cause my land to fall into the pit.³ And if in the exercise of ordinary care and skill in making an excavation for the improvement of his own lot, he digs so near the foundation of a building on my lot as to crack it and cause it to settle, he is not liable for any injury.⁴

The action may be maintained for injuries to land occasioned by the defendant's cattle, or fowls, or inanimate chattels, as well as for direct injuries by wrongful act or negligence. The owner of such animals as are not restrained by fences, must keep them on his own premises at his peril, and he is accountable for any injury they do to his neighbors.

¹ 10 John. 860.

² 1 Denio, 91.

³ 4 Paige, 169.

⁴ 17 John 92.

He is not liable, however, for damages committed by such animals as are usually restrained by fences, if they escape from his premises into his neighbor's land, through the defect of a fence which the latter is bound to repair.¹ It is, therefore, important to examine the rules in relation to the maintenance of fences.

In relation to Division and other Fences.

The statute, as amended in 1866, provides the following rules in relation to division and other fences :²

§ 30. Where two or more persons shall have lands adjoining, each of them shall make and maintain a just and equal proportion of the division fence between them, in all cases where one-half or more of each of such adjoining farms or lands shall be cleared or improved.

§ 31. Where two or more persons shall have lands adjoining, and not within the provisions of section thirty of said article, as hereby amended, each of them shall make and maintain a just and equal proportion of the division fence between them, except the owners of either of the adjoining lands shall choose to let such lands lie open to the public. If he shall afterwards inclose it, he shall refund to the owner of the adjoining land, a just proportion of the value at that time of any division fence that shall have been made and maintained by such adjoining owner, or he shall build his proportion of such division fence.

§ 32. Where a person shall have a farm or lands lying open, one-half or more of such farm or lands being cleared or improved, he shall refund to the owner of the adjoining land, a just proportion of the value at the time this act shall take effect, of any division fence that shall have been made and maintained by such adjoining owner, or he shall build his proportion of such division fence.

§ 4, *As Amended*.—Where two or more persons shall own lands adjoining, in case either of them shall sell, convey, or devise such lands, or any portion thereof, the owner of any division fence that shall have been theretofore made

¹ 12 John. 433.

² Session Laws of 1866, Ch. 540.

and maintained by him, shall not be deprived of his interest therein in consequence of such sale, except so far as it relates to the grantor, and in all cases where such sale or devise shall interfere with or affect the division fences existing between such adjoining owners at the time of such sale, or on receiving such devise, a subdivision of such division fence shall then be made by all the adjoining owners affected thereby ; and each adjoining owner shall refund to the owner of the adjoining land, a just proportion of the value at the time of such sale, or on receiving such devise, of any division fence that shall have been theretofore made and maintained by such adjoining owner, or that shall have been made and maintained by the persons from whom he received such title, or the adjoining owner shall build his proportion of such division fence. The value of such fence, and the proportion thereof to be paid by such person, and the proportion of the division fence to be built by him, shall be determined by any two fence viewers of the town.

§ 33. If disputes arise between the owners of adjoining lands concerning the proportion or particular part of fence to be maintained, or made by either of them, such dispute shall be settled by any two of the fence viewers of the town.

§ 34. When any of the above mentioned matters shall be submitted to fence viewers, each party shall choose one ; and if either neglect, after eight days' notice to make such choice, the other party may select both.

§ 35. The fence viewers shall examine the premises and hear the allegations of the parties. In case of their disagreement, they shall select another fence viewer to act with them, and the decision of any two shall be final upon the parties to such dispute, and upon all parties holding under them.

§ 36. The decision of the fence viewers shall be reduced to writing, shall contain a description of the fence, and of the proportion to be maintained by each, and shall be forthwith filed in the office of the Town Clerk.

§ 37. If any person liable to contribute to the erection or reparation of a division fence, shall neglect or refuse to make and maintain his proportion of such fence, or shall permit

the same to be out of repair, he shall not be allowed to have and maintain any action for damages incurred, but shall be liable to pay to the party injured, all such damages as shall accrue to his lands and the crops, fruit trees and shrubbery thereon and fixtures connected with the said land, to be ascertained and appraised by any two fence viewers of the town, and to be recovered with costs of suit; which appraisalment shall be reduced to writing, and signed by the fence viewers making the same, but shall be only *prima facie* evidence of the amount of such damages.¹

§ 38. If such neglect or refusal shall be continued for the period of one month after request in writing to make or repair such fence, the party injured may make or repair the same at the expense of the party so neglecting or refusing, to be recovered from him with costs of suit.

§ 39. If any person who shall have made his proportion of a division fence, shall be disposed to remove his fence, and suffer his lands to lie open to the public, he may do so, provided such farm or lands are not one-half or more cleared or improved, at any time between the first day of November in any one year, and the first day of April following, but at no other time, giving ten days' notice to the owner or occupant of the adjoining land, of his intention to apply to the fence viewers of the town for permission to remove his fence; and if at the time specified in such notice, any two of such fence viewers to be selected as aforesaid, shall determine that such fence may, with propriety, be removed, he may remove the same.

§ 40. If any such fence shall be removed without such notice and permission, the party removing the same shall pay to the party injured, all such damages as he may sustain thereby, to be recovered with costs of suit.

§ 41. Whenever a division fence shall be injured or destroyed by floods or other casualty, the person bound to make and repair such fence, or any part thereof, shall make or repair the same, or his just proportion thereof, within ten days after he shall be thereunto required by any person in-

¹ As amended Ch. 261 of Laws of 1838, [4th ed. R. S. vol. 1, p. 662.]

terested therein. Such requisition shall be in writing, and signed by the party making it.

§ 42. If such person shall refuse or neglect to make or repair his proportion of such fence, for the space of ten days after such request, the party injured may make or repair the same at the expense of the party so refusing or neglecting, to be recovered from him with costs of suit.

§ 43. Witnesses may be examined by the fence viewers on all questions submitted to them, and either of such fence viewers shall have power to issue subpoenas for and to administer oaths to such witnesses; and each fence viewer and witness thus employed shall be entitled to one dollar and fifty cents per day. Such fence viewers, or a majority of them shall determine what proportion thereof shall be paid by each of the parties interested in such division fence, and reduce their determination to writing, and subscribe the same, and file it in the office of the Town Clerk, where such fence viewers shall reside. The party refusing or neglecting to pay such fence viewers or either of them, shall be liable to be sued for the same, with costs of suit.

§ 44. Whenever the electors of any town shall have made any rule or regulation, prescribing what shall be deemed a sufficient fence in such town, any person who shall thereafter neglect to keep a fence according to such rule or regulation, shall be precluded from recovering compensation in any manner for damages done by any beast lawfully going at large on the highways, that may enter on any lands of such person, not fenced in conformity to the said rule or regulation, or for entering through any defective fence.

§ 45. When the sufficiency of a fence shall come in question in any suit, it shall be presumed to have been sufficient until the contrary be established.

The occupant of land under a lease, who is interested in maintaining a division fence, is entitled to avail himself of the remedies afforded by the statute, as well as the owner of the fee.

The notices and requests necessary to be given under the provisions of the statute may, except where its language

expressly requires that they should be in writing, be given verbally, and where the notice is in writing, its contents may be proved by parol.¹

An agreement relative to the proportions or particular part of a partition fence to be maintained by each, may be made between adjoining owners without resorting to the provisions of the statute, but in order to render it permanent and effectual it should be made between the owners of the freehold.² And after such an agreement, if a dispute arise concerning the proportion or particular part of the fence to be maintained by each, it may be determined by the fence viewers.³

The obligations of adjoining proprietors in relation to the particular fence to be supported by each, may also be determined by *prescription*, or an usage of the tenants for a "time whereof the memory of man runneth not to the contrary." In such cases, the law will assume that there may have been ancient assignments or agreements to regulate them which have become lost by lapse of time.⁴

Where two persons own lands adjoining, and there is a division fence between them, one portion of which one of the parties is bound to repair, and the other portion the other party is bound in like manner to keep in repair; and the cattle of one of them escapes from his field through the division fence into the field of the other, by reason of the defect or insufficiency of that portion of the division fence, which the latter is bound to keep in repair, he has no remedy. And if the cattle, while so upon his land, do him damage, it is his own fault.⁵

The provision of the statute directing that owners of adjoining lands shall each make and maintain a just proportion of the division fence between them, unless one of them shall choose to let his land lie open, was intended to apply to cases where lands have been partially fenced, as well as to those in which the owner chooses to let his land lie altogether in commons. The language of the statute includes

¹ 3 Wend. 142, 148; 9 John. 136. ⁴ 6 Mass. R. 96.

² 4 John. 414; 1 Cowen, 80, note *a*. ⁵ Cowles vs. Balyer, 47 Barb. 562.

³ 4 John. 414.

any case where the owner does not choose to inclose his land entirely.¹

Where a division fence between adjoining owners has been in existence, and acquiesced in by the parties as on their dividing line for more than forty years, the law will determine the line of such fence to be the true line between the parties. And this, notwithstanding the fence was originally put up under an agreement that it was to be altered at some future day, in case it should be found, upon actual survey, not to be on the true line. In such cases it is the long acquiescence which renders the practical location conclusive.²

Cattle Going at Large on Highways.

By the Revised Statutes it is provided that the electors at town meeting in each town may make "rules and regulations for ascertaining the sufficiency of all fences in such town; *for determining the times and manner in which cattle, horses or sheep shall be permitted to go at large on highways, and for impounding cattle.*"³ It has been doubted whether the Legislature has the power to authorize a regulation to permit cattle to go at large, and depasture upon the highway where it runs over the land of another person than their owner. The right of the public to a highway as laid down in all the early authorities, is merely an easement to pass and repass upon it, and subject to this right, the soil and its products belong to the proprietor, and are still in the strictest sense private property; it has, therefore, been contended, that to allow the public to turn animals upon it to depasture, or to use it for any other purpose than as a road, is not within the province of the Legislature. As there has been considerable discussion of the question in our courts, and it has not been settled by the tribunal of dernier resort, a synopsis of the opinions which have been delivered upon the subject, although furnishing no certain rule, will present to the reader a view of the present state of the question.

¹ *Chryslar vs. Westfall*, 41 Barb. 159. ³ 1 R. S. 841, § 5, sub. 11. [4th ed.

² *Pierson vs. Mosier*, 30 Barb. 81; p. 647.]

16 N. Y. 359.

By a former act, towns had power to make regulations "for permitting or preventing cattle, &c., to go at large, and for directing the time and manner of using their common lands."¹ In a case which arose under this statute, Ch. Justice Savage remarks, "This section undoubtedly has reference to such towns only as have common lands, the property of the town in its corporate capacity." In another part of his opinion he continues, "Suppose a case where the town has no common land, and they pass a by-law permitting cattle to run at large—where are they to run? Surely not on individual property. Where then? in the highway? The public have simply a right of passage over the highway. They have no right to depasture the highway. The owner of the land through which the highway runs is the owner of the soil, and of the timber, except what is necessary to make bridges, or otherwise aid in making the highway passable, (15 John. 453;) and if the owner of the soil owns the timber, why not the grass? This question has never been distinctly raised in this court, and some intimations have been given from which it might be inferred that towns have a right to permit cattle to run at large in highways; but in *Stackpole v. Healy*, (16 Mass. 33,) the question has undergone a very full consideration and discussion, and the Supreme Court of Massachusetts have decided that the public have no such right in highways."²

The intention of the Legislature by adding to the words, *to go at large* "*on highways*," was doubtless to give the right of making regulations to authorize cattle to depasture on highways. The constitutional right to enact such a law is distinctly denied by Ch. J. Beardsley, in the case of the *Tonawanda Railroad Company v. Munger*,³ he holding that the right of the public is only that of an easement, subject to which the proprietor owns the soil and its herbage. It was not, however, a distinct question in the case whether such a regulation was constitutional, and the remark was therefore *obiter*. The judgment of the Supreme Court in the case was affirmed in the Court of Appeals,⁴ and no dis-

¹ 2 R. L. 131, § 12.

² 3 Wend. 142.

³ 5 Denio, 255; 9 How. Pr. 453.

⁴ 4 Comst. 349.

approbation of the doctrine contained in the opinion expressed.

This case was followed by *White v. Scott* in the first judicial district, decided in 1848. In this case, Justice McCoun delivered the opinion of the court. In examining the statute he holds that it is constitutional, but that it is to be construed to authorize regulations to be made to permit one to depasture the highway *which is upon his own lands* subject to such safeguards to prevent trespasses upon the lands of others, as the town by its "*regulations*" provide.¹ It is to be remarked of this case, as one of the last mentioned, that the question was not necessarily before the court.

The last case upon the subject, and one where the question was distinctly before the court, was that of *Griffin v. Martin*,² decided at the general term of the Supreme Court in the fourth judicial district, in November, 1849. Justice Willard, in a very learned opinion, reviews the earlier cases and *dicta* and arrives at the conclusion that the Revised Statutes, in making a provision for the compensation of owners of land over which a highway is laid, and at the same time authorizing towns to pass regulations to permit cattle to run at large therein, contemplate a compensation for all damage to be sustained by the proprietor for this, as well as the ordinary use of the highway for passing. Justice Paige concurred in the opinion. Justice Hand dissented, holding that the Legislature had no constitutional right to pass an act authorizing towns to depasture upon the highway where it ran over the land of another person, and approving the *dicta* of Ch. J. Beardsley and Justice McCoun.

As the law now stands, the most recent decision of the Supreme Court, and indeed the only one which has been made where the question has distinctly arisen since the Revised Statutes were enacted, is by a majority vote of two Justices against one, in favor of the constitutionality of the law, and against the opinions expressed by Ch. Js. Savage and Beardsley and the Justices in the First Circuit, as well as the opinion of the Supreme Court in Massachusetts in the case referred to in the text.

¹ 4 Barb. 56.

² 7 Barb. 297.

It is doubtful whether a town can by regulation interfere with the interior regulation of one's farm, by compelling the owner to keep his swine or other animals shut up in a close pen; and a by-law that, "All hogs shall be shut up," must be construed to mean merely that they shall not go at large on the highway, and not to restrain their owners from permitting them to be at large on their own lands. And if hogs at large on their owner's lands break through the defective partition fence of his neighbor, and which he is bound to maintain, no action will lie for the damage they commit, notwithstanding such a by-law.¹

Where cattle or other animals are not *lawfully* in the highway, the owner is liable for the damage they do, if they break through the outer fence adjoining the highway or common, although the fence be a defective one.² It is obvious that the question whether they are lawfully in the highway in a town which has passed a regulation permitting them to go at large in the highway, depends upon the constitutional question whether the Legislature can confer such a power upon towns of permitting a man's soil, over which the highway passes to be depastured by the public.³ Where, however, there is no town regulation, cattle cannot be lawfully in the highway, except while using it for the mere purposes of passing upon it, and their owner will be liable for any damage they occasion by passing from it to his fields, whether they are defectively fenced or not. He is bound to keep his cattle on his own premises, and answerable when they come on his neighbor's, except it be through the neighbor's defective division fence.

Flowing Lands by Water.

Among the various injuries to real property, the subject of action in a Justices' Court, may be enumerated the damage sustained by flowing it by a mill-dam; the diversion from its natural course of a stream of water running to the plaintiff's mill or across his land; the confining it in a pond and discharging it at irregular or inconvenient times to the

¹ 12 John. 433.

² 3 Hill, 38.

annoyance of the proprietors below;¹ the obstruction of one's private road or its unauthorized use.

The rule in relation to the flowing of waters is, that "every one has the right to the flow of water in his own land without diminution or alteration;"² "each proprietor has an equal right to use the water which flows in the stream, and consequently no proprietor can either diminish the quantity which would otherwise descend to the proprietors below, or throw the water back upon the proprietors above."³ "The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not."⁴ "Mere priority of appropriation of running water confers no exclusive use."⁵

Within these principles it is held, that where the water of a river is divided by an island, so that only one-fourth of the stream descends on one side of the island, the owner of the shore where the largest quantity of water flows, is entitled to the use of all the water flowing there, and the owner of the other shore may not place obstructions at the head of the island, to cause one-half of the stream to descend on his side of the river. Nor can the latter require the other in the use of the water, to keep up a tight and secure dam. If either can avail himself of the natural advantages afforded by his site, with no dam or an imperfect one, he may do so.⁵

In Connecticut, where the defendant raised his dam below on the same stream with the plaintiff's mill, which at first did not affect the plaintiff's water wheel, but afterwards, when he had occasion to lower it, clogged it with back water, was held that an action lay.⁶ In England, the occupier of a mill maintained an action for forcing back water to his injury, although he had within a few years previous, erected a wheel requiring less water than he had previously used.⁷

In all cases where an unlawful or wrongful act is committed upon the real property of another, the law implies

¹ 3 Kent's Com. 440.

² 6 East, 214, per Ld. Ellenborough.

³ 1 Sim. & Stu. per S. J. Leach.

⁴ 4 Mason 400, per Story J.

⁵ 10 Wend. 260; Cowen & Hill's Notes, 377.

⁶ 9 Conn. 162.

⁷ 1 Barn. & Ald. 258.

an injury, and in an action for it, nominal damages must be given. The flowing of land by means of another's unauthorized dam, though in the least possible degree, is within this rule.¹ But in a case where the plaintiff complained that the defendant erected above him a dam, on a stream which passed through his land, and thus caused the water to run in a different channel, and with greater violence than before, and so injured his banks and premises, the jury found the plaintiff's banks were not injured by the dam, but added that the plaintiff had no right to stop the water in the summer time, it was held that an entry of a verdict for the defendant, ordered by the Judge on the finding, was right; that flowing water is *publici juris*, and an individual can only acquire a right to it by appropriating so much of it as he requires for a beneficial purpose; and that, therefore, the plaintiff could not recover damages for the mere erection of a dam, but was bound to allege and prove that he had sustained an injury from the want of a sufficient quantity of water.²

One may not, however, divert the water from running in its natural course to another's mill, and in order for a plaintiff to maintain an action, for thus violating his rights, it is sufficient to show his possession of the mill.³ By the prior erection of a mill, upon a stream of water, one does not gain an exclusive right to use the water against another who erects a dam above him, by which the water is in part diverted, and he in some measure injured.⁴ Each owner has a right to the reasonable use of the water flowing over his land, yet he has no right to use the water as he pleases, or to stop the natural flow of the stream, so as to destroy or render useless the mills below him, and if he either detain the water unreasonably, or let it out of his pond in such unusual quantities as to prevent the owners below from using it, and to deprive them of a reasonable participation in the benefits of the stream, he is liable to them for the injury they sustain thereby.⁵ A continued use of the water, in a

1 1 Rawle, 27.

2 4 Dowl. & Ry. 588.

3 2 Har. & McHen. 473.

4 15 John. 213.

5 17 John. 306; 9 Wend. 316; 3 Paige, 577; 6 Id. 435.

particular manner, for twenty years, will, however, afford the presumption of a grant by the owners above and below affected by it, and bar their claims.

III. Of Actions for Taking, Detaining or Injuring Personal Property.

The term *personal property*, as used in the Code of Procedure, includes money, goods, chattels, things in action and evidences of debt,¹ and with the exception of real estate, it includes every thing in which one can have a valuable interest. One may have this interest in any domestic animal, as a dog or a cat, or in animals naturally wild which have been tamed, as wild geese, hares, deer in a park, rabbits in an enclosed warren, doves in a dove house, pheasants or partridges in a mew, hawks that are fed and commanded by him, and fish in a private pond or tank. In the case of animals naturally wild which are so tamed or secured, the owner has a *qualified right* of property. They continue his until they regain their natural liberty, but no longer. They do not, however, regain this liberty merely by being let loose, because many of them go and return at pleasure, and as long as they do so and do not deviate from their usual time of returning, the private ownership continues.² Where wild geese had been tamed, the fact that they had twice strayed away, was held no excuse for one who took them from their owner. The question in such a case is, whether the animal have so regained his liberty as to lose all disposition to return to its owner.³ Bees when hived are of this description of qualified property, as are also the young of wild animals found upon a man's land before they are able to escape.⁴ In order to acquire a property in a wild animal by hunting him, he must be actually taken or reduced by wounds, traps or nets, to such a situation that he cannot escape. Merely being on the point of taking him, although one have chased him with his hounds all day, will give him no right to claim him against a person who should then step in and kill him.⁵

¹ Code of Procedure, § 463. [4th ed. R. S. vol. 2, p. 558.]

² 2 Bl. Com. 391, 2.

³ 10 John. 102.

⁴ 3 Bl. Com. 394.

⁵ 3 Caines, 175.

Where personal property belongs exclusively to any person, he is said to have a *general property* in it, and is then called its *owner*. To this title, possession is always presumed to attach. Where one holds goods as a bailee, or has any temporary interest therein, either in his own right and for his own use, or by authority of law for legal purposes, he is said to have a *special property* in them.¹ Within this class are all persons who have hired personal property for a time, or who are entitled to its temporary possession, and persons having a lien upon it. Where the owner of property in the actual possession of another, has the right to reclaim it immediately, he has the *constructive possession*.²

An action for the wrongful taking or detention of personal property lies, although there be no wrongful intention; as if a sheriff or constable by mistake take the goods of a wrong person in execution, or levy upon goods by virtue of an execution after its return day, and if this be done by direction of the plaintiff and his attorney, they are all equally liable.³ So if one who has purchased at a sheriff's sale, property of another person than the defendant in the execution, upon which he had by mistake levied, he would be liable for the property, if upon request from the owner he should refuse to deliver it to him, though he would not be for simply receiving it from the sheriff upon the sale.⁴

Any one who unlawfully intermeddles with another's goods, although there be no manual interference with them, as by exercising an authority over them in defiance or exclusion of the owner, is liable for the damages he sustains in consequence of such acts. Thus a constable who having an execution against G. levied upon goods in his possession belonging to L., made an inventory of them, and took security for their delivery, was held liable;⁵ and in another case, a constable who required a receiptor with whom he left the property, was held liable for his wrongful levy.⁶ In a more

¹ 1 Caines, 14; 12 John. 408; 7 Cow. 294. ⁴ 2. Rolle's Ab. 556; pl. 50; Bro. Ab. Trespass pl. 48; 6 John. 44.

² 8 Pick. 333.

⁵ 7 Cowen, 735.

³ Chitty's Pl. 129; 3 Lev. 37; 7 Cow. 735; 10 Wend. 349. ⁶ 8 Wend. 610.

recent case, where the constable went to the place where the property was, informed the persons in whose possession it was that he had levied upon it, and requested them to keep it until he called for it, an action for the possession of the property, brought against him, was maintained,¹ the court holding that a naked levy without any manual interference with, and without any exercise of ownership or authority over it, excepting what might be inferred from the act of levying, was sufficient to justify an action against either the officer or the party directing him.

A sheriff or constable who has levied goods upon an execution, may maintain an action against any one who takes, detains or injures them, and proof of the execution and levy is sufficient to sustain his action without showing the judgment.² A purchaser must, however, show the judgment, execution and sale, in order to maintain an action against a third person, unless he has reduced the property to actual possession before the wrongful act complained of.³ If, however, he have purchased in good faith upon a sale upon an execution, he does not lose his title to the property, even if the judgment be reversed. In an action brought by a defendant against an officer for levying upon his property, it is sufficient for the officer to show an execution in his hands regular on its face.⁴

The action of *trover*, prior to the adoption of the Code of Procedure, was the usual one to recover the value of property which had been unlawfully appropriated by a defendant to his own use.⁵ It was in form an action upon the case, for the conversion of property of the plaintiff which had casually come into the defendant's possession *by finding*. The real grievance complained of, however, was the *conversion*, and as it was in some respects a more convenient action to maintain than trespass for the actual wrongful taking of the property, it was commonly resorted to in all cases where the defendant wrongfully converted the property, whatever

¹ 10 Wend. 849; 15 Id. 631.

² 6 John. 195.

³ 7 John. 535; 12 Id. 218, 215.

⁴ 12 John. 395; 5 Wend. 170; 6 Id. 367; 12 Id. 496; 2 Denio, 86; 2 Comst. 473.

⁵ Bac. Ab. Trover. A; 15 Petersd. Ab. 190, n.

might have been the manner in which he obtained its possession. Any person having either the general or special property in the thing converted might bring the action. Thus every one who was entitled to the possession of goods or chattels as against other persons than their owner; as carriers, factors, consignees, pawnees, trustees, agisters of cattle, persons who have borrowed horses to use, and indeed every bailee who was not the mere servant of the owner, might bring the action against any one but the owner.¹ And in general where goods bailed were converted by a stranger, either the bailor or bailee might bring the action, and the one first bringing it determined the right of the other, and recovered the whole value of the goods.² But where the goods were bailed to the bailee for a certain time which was unexpired, the bailor not being then entitled to the possession, could not bring the action for that reason, as it was necessary in the action for the plaintiff to have the right of possession. The bailee there could alone bring it.³ What effect the provision of the Code of Procedure requiring all actions to be "*prosecuted in the name of the real party in interest*,"⁴ may have had upon the right of bailees to prosecute for the conversion of property of their bailors, has not hitherto been judicially determined. Where the bailee stands in the position of a warrantor or insurer of the goods, and is liable for their full value to the owner, or where he has a lien upon them for their full value, he clearly has an interest in them to the extent of their value, which is prejudiced by their wrongful taking and conversion, and in conformity to the general object of the provision of the Code referred to, should bring his action for the damage to himself. In like manner, where he has a special property in them for but a portion of their value, he should bring his action for the damage to himself. But where he is but a naked bailee, without interest, as a consignee to sell, who has not made advances, the policy and plan of the Code of Procedure

¹ 13 Wend. 63; 6 Barb. 362.

² 7 Cowen, 328.

³ 8 John. 432; 15 Wend. 474; 9 Cow.

52.

⁴ Code of Procedure; § 111. [4th ed. R. S. vol. 2, p. 499.]

seem to indicate that the owner should bring the action ; and that where one having special property in them, recovers for the injury he has sustained, the owner should not be barred from obtaining his damages in another action. In practice, it will generally be as convenient to bring the action in the name of the owner as of a consignee or other naked bailee. Where brought in the name of a consignee, and an unqualified assignment is shown, the legal presumption is that he is the owner until the contrary be shown.¹

Possession of personal property is *prima facie* evidence of title,² and is sufficient to warrant a recovery for taking or detaining it against all persons except the owner, or those who have some right or interest derived from him. Thus, the finder of a chattel has a special property in it, which is good against every person but the owner or his bailee. But the finder of a chose in action has no special property in it, and where M. found a lottery ticket, and gave it to W. to advertise for the owner, and none appeared, and it finally drew a prize which he received, it was held that M. could not recover the money received upon it from him.³

Where one who had only a special property, brought his action of trover against another who converted it, the defendant might, by showing the ownership in a third person, and that through him he held some claim to the property, and that the defendant had either had no special property, or none at all, as against the owner, mitigate the damages or defeat the action entirely. But it was not enough to show property in a third person, without also showing some right in the defendant derived from him.⁴

A constable or sheriff has a special property in goods upon which he has levied, and can maintain an action for them against any person who, without right, takes them from him, or from any one with whom he has deposited them for safe keeping, and his right of property is in no way affected by the circumstance that the levy is excessive.⁵ If the action be brought by the officer against the defendant in the exe-

¹ 15 Wend 474.

² 11 Wend. 54.

³ 9 Cowen, 670.

⁴ 11 Wend. 54; 16 Id. 562.

⁵ 1 Cowen, 322; 2 Hill, 425; 3 Hill, 215.

cution for taking the goods away, or if, on the contrary, the defendant in the execution sue the officer for levying on the goods, the execution, if good upon its face, is sufficient evidence of his right without showing the judgment upon which it was issued.¹ It is also sufficient in an action by an officer against a mere stranger, without pretence of title, who intermeddles with the goods,² or a purchaser at the sale, for the price bid for them.³ It is otherwise, however, where a stranger sues the officer and shows a title in himself, prior to the levy, for then the officer can only defend himself by showing the stranger's title void in respect to creditors, and to do this must show the judgment.⁴

An officer's right against an officious stranger depends upon his special property. His process and levy shows this *prima facie*. But where the stranger showing a title brings the action he can show that the officer's process was void, as having been issued upon a judgment obtained without jurisdiction, in which case the officer has no special property, and is not liable over. And where an officer sues to recover property levied on, and it appears that the plaintiff in the execution is the real party in the action, the officer being a mere nominal party, must show a valid judgment.⁵

The title of a purchaser of goods upon an execution depends upon the validity of the judgment as well as the execution. Where, therefore, he either brings his action against the former owner, or any one in whose possession the property purchased is, he must show the judgment, execution and sale. He must also do this in defending his title against the former owner.⁶

It is quite common for a sheriff or constable, after a levy, to deliver the property levied upon to a *receiptor* on receiving his covenant or agreement to return it when called for, or upon the day of sale. Such disposition of it does not change the officer's rights to it. The receiptor for this purpose gains neither a general nor special property as against him. He is his mere servant or agent.⁷

¹ 12 Wend. 75, and cases there cited; Cowen & Hill's Notes, 1078. ⁴ 16 Wend. 514, 516.

² 6 John. 195; 8 Wend. 445. ⁵ 16 Wend. 562.

³ 5 Watts, 515. ⁶ Cowen & Hill's N. 1078, 9.

⁷ 7 Cowen, 294.

As an action for taking, detaining, or injuring personal property, must be brought by the party sustaining the damage arising from the act complained of, it will often be necessary to determine the ownership of the property in question upon the rules governing the transmission of the title in contracts of sale. The true inquiry in all such cases is, whether the title has so passed that the property is at the risk of the vendee. If it has, the sale is *executed* and the vendee is its owner. If it has not, the contract of sale is merely *executory*, and if the goods are stolen or destroyed, the vendor must abide the loss.¹

Where a mechanic is employed in making an article for me, if it be made from his own materials, or if the principal materials be his, the article is his until completed and delivered to me. If, on the other hand, the principal materials are mine, the property remains mine, notwithstanding his expenditure of labor or of materials upon it, but he is entitled to retain it under his lien for his labor and materials furnished. Thus, where a ship carpenter builds for me a ship with his own materials, although I have paid him for it in advance, the title of the ship is in him until its delivery, and if it should casually be destroyed, the loss is his; where he builds it for me, of my materials, it remains mine subject to his lien. In either case, an execution against the person deemed the owner, may be levied upon it.²

The rule is the same where one takes raw materials to manufacture upon shares, as black salts to make into pearl-ashes,³ or corn to make into whisky,⁴ and it will make no difference if the manufacturer gives security to the person furnishing raw materials to account for his share.⁵

Where personal property is obtained wrongfully, the taker cannot, by any act of his own, acquire title to it by converting it into a different species of property. It remains the property of the original owner as long as the identity of the original materials can be traced. Thus, where timber is converted into shingles,⁶ corn made into whisky,⁷ cloth

¹ 15 John. 349.

² 7 John. 478.

³ 10 John. 287.

⁴ 7 Cowen, 328.

⁶ 5 John. 348; 9 Id. 362.

⁷ 3 Comst. 379.

⁵ 12 Wend. 51.

made into a garment, or leather into shoes, the title to the manufactured article remains in the owner of the raw materials. But if the identity of the thing be destroyed, as if the timber had been made into shingles or boards, and they worked into a house, so as entirely to change their nature from timber to real estate, or if money be converted into a cup, the title is changed.¹

If the personal property obtained wrongfully, is converted by an innocent purchaser, into an article of a different species, the rule laid down in the last section does not prevail. In such a case the title of the manufactured article is in the innocent purchaser.²

A sale procured by fraud passes no title to the purchaser, whatever may be the degree of fraud;³ but in such a case where the owner had parted with his possession to the fraudulent vendee, and furnished him with the external indicia of the right of selling the goods, he cannot recover the goods from an honest purchaser of the fraudulent vendee,⁴ who, at the time of purchase, paid a good consideration for them.⁵ But an assignee of the fraudulent vendee, or one who bought them of him in payment of a previous debt, or a sheriff who levies upon them with an execution against him, have no title as against the original owner.⁶

If the purchase be obtained by an act amounting to felony, their sale to a *bona fide* purchaser will not affect the title of the original owner.⁷

Where goods are bought under false pretences, if the seller knowing the fraud, sues for the price, he affirms the sale.⁸ And where one wrongfully takes goods into his own possession, and the owner recovers a judgment against him for its value, the satisfaction of the judgment transfers the title of the goods to him.⁹

Where one repairs or renews an article for another, the

¹ 7 Cowen, 95, 97.

² 3 Comst. 379.

³ 14 Wend. 31; 1 Hill, 311.

⁴ 10 John. 185; 8 Cow. 238; 20 Wend. 267; 14 Id. 31; 1 Paige, 492.

⁵ 13 Wend. 570.

⁶ 13 Wend. 570; 20 Id. 267; 23 Id. 611, 372.

⁷ 3 Barb. 20.

⁸ 4 Paige, 537.

⁹ 6 John. 168; 8 Cowen, 438.

title to it remains in the original owner, notwithstanding the relative value of the labor and materials bestowed upon it, in repairing or renewing it, may exceed its original value.¹

If one becomes possessed of an article belonging to another, as a wagon, and his servant changes a portion of its appendages by substituting new whiffletrees or clevises for those attached to it when he obtained it, and the owner repossesses himself of the wagon without knowledge of the change, an action will not lie against him for the taking. It seems, however, that if, upon the owner of the substituted articles demanding them, he refuses to deliver them to him, he is liable for the conversion.²

Gift.

A gift of property without delivery will not pass the title of it to the donee, so as to enable him to bring an action in relation to it;³ as if one should say to another, "I will give you the corn growing in that field," unless it is delivered, the donee is liable for taking it away. The delivery may, however, be inferred from circumstances as in other cases. And where a father bought a lottery ticket which he declared he gave to his infant daughter, and wrote her name upon it, and after it drew a prize said the money was hers, it was held that the jury might infer a gift and delivery.⁴

Where animals are let for hire, their increase belongs to the person who hires them, unless it is otherwise agreed at the time the contract is made.⁵ It is otherwise, however, where they are lent. In that case the owner is entitled to the increase.⁶

Where one delivers personal property to another to be returned after a certain time, at the expiration of the time it reverts to the bailee, and he may take it from one having a wrongful possession without rendering himself liable. It is otherwise, however, where the contract is in the alternative, as to redeliver the article or another of the same kind and quality.⁷

¹ 2 Denio, 628.

² 13 Wend. 296; 16 Id. 514.

³ 2 Str. 955; 2 John. 52; 7 Id. 26;
12 Id. 188.

⁴ 10 John, 298; 2 Str. 955.

⁵ 8 John. 432; 12 Id. 314.

⁶ 9 Cowen, 687.

⁷ 7 Cowen, 752.

It is essential to the validity of a gift that it goes into effect immediately and completely, and where the donor had just purchased some household furniture under a sale on a chattel mortgage made by A., which furniture was then in the house of A., and in the possession and use of his family, and the donor pointed out a part of the furniture to the wife of A., and told her that he gave her that property, and all that he had purchased on that day, this was held to be a valid gift, and it was also held that although the furniture continued to remain in the house, and in the use of the wife and family as before, it was not liable to be taken by the creditors of the husband, although he continued to reside in the house.¹

If it is to take effect in future, it is a mere promise, and, since it is a promise made without any consideration to support it, the law will not enforce it. For this reason it is indispensable that every oral gift to be valid should be accompanied by an actual or symbolical delivery of the thing given, if the subject matter is capable of delivery. In this respect there is no difference between a gift between living persons or one made in view of death. If the possession, or some means of obtaining the possession and control, is not transferred to the donee, the title does not pass. But the delivery need not be to the donee in person, a delivery of the thing given to a third person for the use of the donee is sufficient.²

It is clear upon authority that choses in action, such as bonds and mortgages, and promissory notes not indorsed, may be well transferred by delivery only.³

Liens.

Liens are within the definition of special property. They are either *general* or *specific*. A *general lien* is a right to detain the property of another in the possession of the bailee until all his claims against the owner are paid. A *specific*

¹ Allen vs. Cowen, 9 E. P. Smith, ³ Westerlo vs. De Will, 86 N. Y. 340, 502; reversing 28 Barb. 99. 412.

² 14 Barb. 243; 19 Barb. 631; 25 Barb. 505; 19 Barb. 361.

lien, or as it is sometimes called, a *particular lien*, is a right to detain it until the bailee is paid for some labor or expense bestowed upon the identical property, and nothing more.¹ Possession is necessary to create a lien, except in cases where it arises from a particular contract, as in the case of a mortgage, or from a levy, when it is supposed to be in the actual possession of the officer levying; and as a general rule where the holder of a lien parts with the possession of the property to which it is attached, his lien is lost. The lien simply extends to the detention of the property. It does not authorize the person holding it to sell it without the consent of the owner.² Such a consent may be implied from circumstances as well as by express words,³ and in the case of a factor, he having a right to sell, has the means of payment within his control.⁴

A general lien is founded upon the custom of a particular trade or business, and is not favored in law. It requires strong evidence of a settled and uniform usage, or a particular mode of dealing between the parties to establish it. By the custom of a trade, an agent may have a lien upon the property of his employer intrusted to him in the course of that trade, not only in respect to its management, but for his general balance of accounts. This custom must, however, have been so uniform and notorious as to warrant the inference that the party against whom the right is claimed had knowledge of it, and that his dealings were in contemplation of it. It may also exist by special agreement, as where a dealer gives notice that he will not receive property for the purposes of his trade or business, except upon con-

¹ 2 Kent's Com. 636; Story on Agency, § 375.

² It was intimated by the learned author of Kent's Commentaries (vol. 2, p. 642,) that the only method of enforcing satisfaction from a lien is by a bill in Chancery. This, under our present system of practice would require an action for specific relief, which would be beyond the jurisdiction of a Justices' Court. The editor cannot, however, discover any objection to the party holding the lien bringing his action for the debt owing him, and then by execution levying upon the property subject to his lien. If the debt were of a less amount than would be sufficient to warrant an action in the Supreme Court, it would seem to be a convenient and safe way to realize the benefit of the lien.

³ 22 Pick, 40; Holt's N. P. 383.

⁴ 2 Kent's Com. 642.

dition that he shall have a lien upon it not only in respect to the charges arising upon it, but for the general balance of the owner's account, and it is shown that the owner received the notice prior to entrusting his property with the dealer. In this case the law implies that the dealing with the notice amounts to an express agreement that the general lien shall attach.¹

In respect to a few classes of business, the usage upholding a general lien has been so established that the Courts recognize it without proof. Thus attorneys at law have a general lien upon their client's papers and moneys which come into their hands in the course of their professional business, until their bills for services and disbursements are paid, and the client cannot obtain his papers, whatever may be the result of his action, without paying not only the amount due in respect to the business for which the papers were furnished, but also in respect to all other professional business.² They have, however, no lien upon their client's moneys before it comes into their hands.³ Prior to the adoption of the Code of Procedure, an attorney had a modified lien upon costs incorporated in a judgment recovered in favor of his client, which he might enforce as against the judgment debtor, by giving him notice not to pay them to the client. This description of lien is not abrogated by the Code of Procedure, as was first supposed, but the lien of the attorney retained as before.⁴

Factors have a general lien for liabilities incurred by them in the course of their agency, whether for payments, advances or guaranty;⁵ bankers, one upon the securities and moneys of their customers in their hands, or deposited with them;⁶ insurance brokers one upon the policies in their hands, and any funds received through their means;⁷ common carriers for freight and charges upon goods carried, but not upon general balance unless it can be shown by

¹ 2 Kent's Com. 636.

² Bac. Ab. "Attorney," E.; 2 Kent's Com. 640.

³ 12 Wend. 261.

⁴ Code of Procedure, § 303; 9 How. Pr. R. 16; 4 Barb. 47; 12 How. 136.

⁵ Story on Agency, § 376; 6 Term, 258.

⁶ 3 Bro. C. C. 21; 7 Taunt. 278; Smith's Merc. Law. 338; Story on Agency, § 381.

⁷ 5 Taunt. 56.

express agreement, or notice to the owner.¹ Calico printers, fullers in some places, packers and wharfingers have also been held to have a general lien.²

All tradesmen and agents have a particular lien upon property in their hands upon which they have expended money or labor for the owner.³ The lien extends to the entire work upon which the expenditure has been made, as where a carrier transports an entire cargo, he may retain the whole of it until he is paid for his services.⁴ And where one has bestowed labor on an article for a stipulated price, he will not lose his lien, although the article be delivered at different times while the labor is being bestowed, if the work to be done under the agreement is entire, and the article is in his possession when it is finished.⁵ The law favors a particular lien.

As a specific lien is intended for the convenience and encouragement of trade only, it does not apply where the service or expense bestowed upon the property is not within the scope of some particular branch of commerce or trade. As an illustration of this rule, a farmer or stable-keeper who receives horses to feed and care for, has no lien upon them, because the service is not that of a tradesman. But a tavern-keeper who receives and feeds the horse of his guest has a lien upon it for the service, because it is within the scope of his trade. If, however, the tavern-keeper receives his neighbor's horses into his stable to keep by the week, month or year, he will for this purpose be regarded in the same light as a farmer or stable-keeper, and have no lien except by special agreement. Where on the other hand, a farmer receives horses or colts to train or break, or mares to be covered by his horse, it seems that he will for this purpose be deemed a tradesman, and have a lien.⁶

The lien of a tavern-keeper is in some respects peculiar. He is bound to receive and entertain travelers, and is answerable for the loss of goods of his guest, although they are

¹ Story on Cont. § 331.

² Mont. Law of Lien, 32.

³ 3 Hill, 485.

⁴ Bac. Ab. Trover, E.; 2 Kent's Com. 633.

⁵ 5 Maule & Selw. 180; 3 Id. 167.

⁶ Crow. Car. 271; 3 Hill, 485.

stolen or lost without any fault upon his part. For this extraordinary liability, the law gives him a lien upon their goods for his reasonable charges. In order to constitute one a *guest* within the rule, it is not necessary that he should be actually within the tavern where the loss happens or the lien accrues. If one sends his horse or trunk in advance to an inn, saying he will soon be there himself, he would for the purpose of both the inn-keeper's liability and his lien, be regarded as a guest from the time the host took charge of them.¹ So if he left his horse at the inn to be fed and cared for while he went to a neighboring town to remain a few days and return, the horse will be in the inn-keeper's hands as the horse of a guest, and subject to his lien.² If, however, the guest had left with the inn-keeper some inanimate property from the keeping of which he derived no advantage in the way of his trade, neither the extraordinary liability of the inn-keeper nor his lien would attach. The inn-keeper's lien will be lost as against all persons except the owner, if he permits the goods to be taken away from his possession although they are returned to him. And he cannot detain one horse for the charges incurred for another, where the guest has several horses kept and has taken all but one away.³ His lien for the keeping of the horse of his guest is valid against the owner, even where the guest stole the horse, if it was received and kept without knowledge of the wrongful taking.⁴ The rule is the same if the horse is wrongfully seized under color of a legal proceeding unless he knew the party making the seizure was a wrong doer at the time.⁵

. The lien of a mechanic or manufacturer will attach to the article he manufactures, although the material and a part of the expense bestowed upon it is furnished by the owner. Thus, a brickmaker who manufactured a quantity of bricks upon a brick-yard furnished by its owner, who also supplied all the wood and necessities to carry on the work, and agreed

¹ 3 Hill, 486.

² 25 Wend. 653.

³ 3 Hill, 485; 7 Buls. 207, 217.

⁴ Jac. Law Dic. "Inns;" Salk. 388;

1 Str. 557; 3 Bulst. 268; 1 Roll.

Ab. 449.

⁵ 3 Stark. 172.

to pay the workmen a particular price for every thousand of the brick made upon the return of the vessel that transported them to market, was held to retain his lien until he parted with the possession of the bricks.¹

A person engaging to supply one entire work, has a lien for the price or balance due upon every individual part of it, so that after delivering a part, he may retain the residue for such price or balance.²

A mere creditor has no lien upon the goods of his debtor which may happen to be in his hands, and he cannot, therefore, apply them in payment of his demand.³ But where one advanced money on notes deposited by the payee, to whom they were given for the debt of a third person who was indebted to him, it was held that the lender had a lien.⁴

Wherever there is a lien, the person entitled to it may retain the goods against the owner, until the money owing is either paid or tendered.⁵ The payment or tender of the money owing, satisfies the lien, and then the party owing it is entitled to its immediate possession, and if it is refused, he can maintain an action for its unlawful detention or conversion. And if one having a lien upon goods, claims to retain them upon a different ground when they are demanded of him, and makes no mention of the lien, he will be liable for their detention without showing a satisfaction of the lien.⁶

A lien may be waived by express contract, as where a factor agrees that upon the receipt of his principal's goods, he will, irrespective of his balance, pay him the proceeds. It is also waived wherever the person holding it, enters into a special agreement, inconsistent with its existence, or from which a waiver may fairly be inferred; as when on a purchase, the vendor gives credit by extending the time of payment, or takes a distinct and independent security for it. Here he shows that he relies in one case upon the responsibility of the vendee, and in the other, upon the new security.

¹ 4 Wend. 292.

² 3 Maule & Selw, 167.

³ 15 Mass. 490.

⁴ 1 Marsh. 109.

⁵ 9 Cowen, 52; 6 Wend. 608.

⁶ 1 Camp. 410; 9 Dowl. & Ryl. 31; 20 Wend. 268; 3 Selden, 288.

In 1860, the Legislature passed a law for the benefit of boarding house keepers, as follows :

§ 1. The keeper of a boarding house shall have the same lien upon, and right to detain the baggage and effects of any boarder for the amount which may be due for board by such boarder, to the same extent, and in the same manner as inn-keepers have such lien and such right of detention.¹

The court say, since the Act of April 16, 1860, for the protection of boarding house keepers, the keeper of a boarding house has a lien for board upon the goods brought upon the premises by a boarder to furnish his room, although they in fact do not belong to the boarder, but to a stranger.²

It was the intention of the Legislature by that act to give boarding house keepers the same lien in respect to the effects of their boarders as the common law gave to inn-keepers as to the goods of their guests.

The Legislature in 1867, passed an act to prevent fraud and fraudulent practices upon, or by hotel and boarding house keepers, which reads as follows :

§ 1. Every person who shall at any hotel or inn order and receive, or cause to be furnished any food or accommodation with intent to defraud the owner or proprietor of such hotel or inn out of the value or price of such food or accommodation : And every person who shall obtain credit at any hotel or inn by the use of any false pretence or device, or by depositing at such hotel or inn any baggage or property of value less than the amount of such credit, or of the bill by such person incurred ; and any person, who, after obtaining credit or accommodation at any hotel or inn, shall abscond from such hotel or inn, and shall surreptitiously remove any baggage or property therefrom, shall, upon conviction, be adjudged guilty of a misdemeanor.³

§ 2. Every keeper of a hotel, restaurant, boarding house or inn shall post in a public and conspicuous place in the office or public room, and in every bed-room in said house a printed copy of this act, and a statement of the charge or

¹ Laws of 1860, Ch. 446.

³ Session Laws 1867, Ch. 677.

² Jones vs. Morrill, 42 Barb. 623 ; 3 Hill, 485.

rate of charges by the day, and for meals or items furnished, and for lodging. No charge or sum shall be collected or received by any such person for any service not actually rendered, or for any item not actually delivered, or for a longer time than the person so charged actually remained at such place. For any violation of this section, or of any provisions herein contained, the offender shall forfeit to the injured party three times the amount so charged, and shall not be entitled to receive any money for the meals, items, services or time charged.

The foregoing is an important statute to hotel and boarding house keepers, and should be strictly observed, or they will fail of collecting pay for their services and accommodations.

III. Action for a Penalty given by Statute.

Where a pecuniary penalty or forfeiture is given or granted by law to any person injured or aggrieved by any act or omission of another, the same may be sued for and recovered, and the action shall be prosecuted and conducted in the same manner as other personal actions in all respects, unless otherwise provided, and shall be subject to all the provisions of law concerning amendment of the process, pleadings and records therein.¹

An action upon a statute, for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the people of this State, except where the statute imposing it prescribes a different limitation, must be brought within three years from the time the same occurred.²

An action upon a statute for a forfeiture or penalty to the people of this State, within two years.³

An action upon a statute for a penalty or forfeiture, given in whole or in part to any person who will prosecute for the same, must be commenced within one year after the commission of the offence; and if the action be not commenced within the year, by a private party, it may be commenced within two years thereafter, in behalf of the people of this

¹ 2 R. S. 394, § 1, 2.

² Code, § 92.

³ Id. § 93.

State, by the Attorney General or the District Attorney of the county where the offence was committed.

The most usual actions brought in this court, for a penalty given by statute, are actions for selling strong and spirituous liquors without license, and other penalties arising under the statute to regulate taverns and groceries, actions for various penalties under the act to regulate highways, bridges and ferries, for money, or any other thing won at playing any game, under the statute of *Betting and Gaming*, and a great variety of other penalties for divers offences, scattered through our statute book, the rules of prosecuting for which are nearly the same in all cases. And it is proper to remark here, in regard to these actions, that the husband is, in general, answerable for a forfeiture under a penal statute incurred by the wife, as for selling spirituous liquors without license, winning money at play, and so of other cases.¹

As one of the most familiar actions under this head, I will treat of the action for a violation of the *Excise Law*, and which will show the course to be pursued by Justices of the Peace, in actions of a like character.

All suits for forfeitures incurred for a violation of this statute must be brought in the name of the Overseers of the Poor of the town where the offence was committed, and by Boards of Excise of the different counties in this State.²

A license to keep an inn or tavern is a personal trust, and cannot be assigned so as to protect any one except the *very person* to whom granted.³

Whether a contract to sell five gallons of spirituous liquor, to be taken away in small quantities, at the pleasure of the purchaser, the seller having no license, is a violation of the excise law, depends upon the question whether the seller's intention be fair, or a mere evasion of the statute, and this is a question for the court or jury.⁴

A party who violates the provisions of the Revised Statutes in respect to excise and the regulation of taverns and gro-

¹ 1 R. S. 676, § 15 and 16. Id. 1149; ² 1 R. S. 672, § 45; Wend. 97.
 10 John. 247. (See Act to Sup- ³ 14 John. 231.
 press Intemperance, passed April ⁴ 16 Id. 73.
 16, 1857.

ceries, may be indicted and fined for such violation, notwithstanding he has been sued by the Overseers of the Poor of the town where the offence was committed, and the penalty collected.¹

In an action for a penalty given by the statute for selling strong or spirituous liquors without a license, it is not necessary for the plaintiff to show that the defendant had no license, the *onus* lies upon the defendant to show that he was authorized to sell.²

In debt by Overseers of the Poor for selling spirituous liquors without a license, in violation of the statute, *several* distinct penalties may be recovered in the same suit.³

The provisions of the statute requiring a license for selling strong or spirituous liquors in small quantities, do not conflict with any provisions of the Constitution. The Supreme Court have also decided that selling strong beer without a license, is a violation of the excise law.⁴

A suit against the trustees of a school district to recover teacher's wages, does not abate, and is not discontinued by the expiration of the defendant's term of office, and the choice of other persons to succeed them.

If, where the suit is in a Justices' Court, their successors voluntarily appear and consent to be substituted as defendants, (or pl'ffs.) such substitution should be made, and the suit should proceed. But a Justice of the Peace has no power to compel the substitution of new parties in a suit before him, (*the provision in 2 R. S. 474, § 100, not being applicable to Justices' Courts.*) Where the new officers do not *apply* to be substituted, the suit against the old ones should proceed, and if a recovery is had, they are entitled to be allowed the amount in their official accounts.⁵

The statute prescribes the forms of pleadings and proceedings in suits for the recovery of penalties and forfeitures, and for money, goods, &c., received contrary to the provisions of any statute.⁶

¹ People vs. Stevens, 18 Wend. 341.

² Potter vs. Deyo, 19 Wend. 361.

³ Rood & Kimball vs. Deyo, 3 Hill, 52.

⁴ 1 Denio, 540.

⁵ Colgrove vs. Breed and others, 2 Denio, R. 125; this applies to

Overseers of the Poor.

⁶ R. S. 273, § 1.

It is provided by statute, that upon every process issued for the purpose of compelling the appearance of the defendant to any action for the recovery of any penalty or forfeiture, shall be endorsed a general reference to the statute by which such action is given.¹

In an action brought in a Justices' Court to recover penalties for a violation of the excise law, it is a sufficient indorsement of the process if it states that such process is issued "according to the provisions of title nine, part one, chapter twenty of the Statute of Excise and the Regulation of Taverns and Groceries," or according to the provisions of section (or as the case may be,) of the "Act to Suppress Intemperance and to Regulate the sale of Intoxicating Liquors," passed April 16, 1857.²

These sections only require that a general reference to the statute in relation to actions for penalties and forfeitures, shall be indorsed on the process, and which is intended to give the defendant notice of the statute he is charged with having violated, and the penalty he has incurred thereby.³

An indorsement as follows: "Issued according to the provisions of the statute concerning the incorporation of turnpike and plank road companies, and the collection of penalties for demanding and receiving more than lawful toll in passing through toll gates on such roads," was held to be a sufficient compliance with the requirements of the statute. The section of the statute giving a penalty of five dollars against toll gatherers on turnpikes, for demanding and receiving more toll than is legally collectable, applies also to all gatherers on plank roads.⁴

It is proper to remark, in conclusion, that in these cases, if the Overseers of the Poor get defeated, and judgment be given against them, no execution can be issued against them to collect the costs, but the record of judgment must be presented to the Board of Supervisors of the county for payment.⁵

It is provided by statute that whenever any recovery shall be had before any Justice of the Peace, for any penalty or

¹ 2 R. S. 395, § 1; 17 Wend. 85.

² 22 Barb. 137; 19 Id. 343.

³ 19 Wend. 50.

⁴ 21 Barb. 319.

⁵ 19 Wend. 50.

forfeiture incurred by violating any provision contained in the 9th title, chap. 20, part 1, entitled, "of excise and the regulation of taverns and groceries, &c.," execution shall issue immediately, and the Justice shall indorse thereon the cause for which judgment was rendered, *which may be as follows*.¹

The cause for which the within mentioned judgment was rendered, was for selling strong and spirituous liquors in violation of the statute, title 9, chap. 20, part 1, section 15.

Justice.

Where a statute imposes a penalty or forfeiture for an act injurious to the rights of another, and the penalty is given to the party aggrieved, it is in the nature of a satisfaction for the wrong done. Only one penalty can be recovered for removing goods from demised premises contrary to the statute, and all who assist in the commission of the offence, may be sued together.²

In an action for the penalty given by 2 Revised Statute 400, section 43, to the aggrieved party, against a witness for not attending court pursuant to a subpoena, it must appear to enable the plaintiff to recover, that the witness was material, and that damages resulted from his non-attendance.³

A party who causes a witness to be subpoenaed, who is known to him not to be material, for the purpose of annoyance, is guilty of a contempt of the court whose process he used.⁴

The omission to pay the witness his fees, is a reasonable excuse for non-attendance, which will protect him from liability for the penalty.⁵

Authorities relating to the various remedies against a defaulting witness referred to.⁵

The provision of 1 Revised Statute, 486, section 100, imposing a penalty upon trustees of school districts for failing to render an account, or to pay over the public money in their hands, on the expiration of their offices, provides for a

¹ 2 R. S. 180, § 140.

² Conley vs. Palmer, 2 Comst. 182;

4 Denio, 374.

³ Courtney vs. Baker, 3 Denio, 27, Beardsley J.; 4 Denio, 75.

⁴ Id.

⁵ Id.

several penalty upon each trustee who shall omit to perform his duty, and does not authorize a joint suit or recovery against several, and where a recovery was had against three for a single penalty, the judgment was held to be erroneous.¹

A single action for the penalty may be sustained against several who join in selling liquors without license.²

Though several concur in the commission of an act for which a penalty is given, only one penalty can be recovered either in one or several actions.³

An officer who collects a district school tax by a sale of property, under a warrant issued by the trustees of the school district, is not subject to the provisions of the title of the Revised Statutes, relative to distraining cattle, &c., nor liable to the penalty of twenty-five dollars, imposed by the twenty-third section, for a neglect to file in the Town Clerk's office, the papers mentioned in the twenty-second section.⁴

A statute ought to receive such a construction as will best answer the intention of the makers, and this intention may sometimes be ascertained by referring to the causes which led to the enactment of the statute.⁵

The Code speaks of an action upon a liability created by statute other than a penalty or forfeiture. Such an action, it seems to me, is not within the jurisdiction of a Justices' Court, unless it comes within an action on *contract*, or of an action for injury to personal or real property.⁶

Under the Turnpike Act, (1 N. R. L. 234,) re-enacted in Revised Statute 590, section 50, the toll gatherer is not liable to five dollars penalty for demanding toll to one exempt from its payment, but only where he demands more than is due, or hinders and delays travelers and passengers bound to pay toll.⁷

This law was held to give a penalty to but one class of persons, viz : travelers or passengers liable to the payment

¹ Marsh vs. Shute, 1 Denio, 230.

² Ingersoll vs. Skinner, 1 Denio, 540.

³ Id.

⁴ Pangburn vs. Smith, 4 Barb. 246, Gridley, J.

⁵ Tonnele vs. Hall, 4 Comst. 140, Jewett, J.

⁶ Code, § 91, sub. 2.

⁷ 1 Cow. Tr. 3d ed. 51; 16 John. 73.

of toll, and for but one offence, viz : hindering or delaying such persons. (2 J. R. 410 ; 16 J. R. 73.)

In view of these decisions, thus construing the Revised Laws, it was enacted by the Revised Statutes that "every toll gatherer, who at any turnpike gate, shall unreasonably hinder or delay *any traveler or passenger liable to the payment of toll*, or shall demand and receive from *any person* more toll than by law he is authorized to collect, shall, for each offence, forfeit the sum of five dollars to the person aggrieved."¹

It is clear that by this law, persons liable to pay toll, can recover a penalty for being unreasonably delayed or hindered, and any person, whether liable to pay toll or not, can recover a penalty, if the toll gatherer exacts from him what, by law, he is not liable to pay.

The Revised Statutes incorporated in the plank road law, gives a penalty for either of two distinct offences: the one offence is to "unreasonably hinder or delay any traveler or passenger *liable to the payment of tolls*," the other is to "demand and receive from *any person* more toll than by law he is authorized to collect."²

And where a turnpike act forbids a person, after having *traveled* upon it, to turn off with his team, cattle, &c., in order to pass the gate or gates, on ground adjacent thereto, and again enter upon the road, with the intention to defraud the company, by avoiding the payment of the toll and inflict a penalty, it is no excuse that he turned off *in good faith*, and though he turned off more than half a mile from the gate, within the meaning of the act.³

A one horse wagon, with spring seats and paneled sides, and which is not used for farming purposes, or carrying goods, is a pleasure carriage within the meaning of the act to establish the *Seneca Turnpike Road Company*. The toll thereof is twelve and a half cents, and no penalty is consequently recoverable for taking that sum.⁴

¹ 1 R. S. 587, § 50; 3 R. S. 528, Note to § 50. ³ 18 John. R. 51; 18 John. 56, and cases cited

² 1 R. S. 587, § 50; 16 John. R. 73; ⁴ 18 John. 128.
Skinner vs. Anderson, 12 Barb. 648.

When a plank road company has erected its toll gates within the distances authorized by law, and has fixed the rates of toll at the several gates at an amount not exceeding the legal rates for the entire distance, and for the distances between the several gates, it may lawfully exact the full toll thus fixed at a particular gate, notwithstanding the traveler may not have traveled upon the road a distance, which, at the established rate per mile actually traveled, would amount to such toll.¹

It seems now to be settled that an action to recover a penalty imposed by the by-law of a municipal corporation, may be brought in a Justices' Court, although the statute authorizing the by-law contains no provision conferring jurisdiction upon Justices of the Peace.²

The statute imposing a penalty of twenty-five dollars upon every person who shall *forcibly and fraudulently* pass any gate on any turnpike or plank road, without having paid the legal toll, is penal, imposing a penalty or forfeiture for the benefit and protection of a private corporation, and in derogation of common right, and is not, therefore, to be extended by construction, to cases within the mischief intended to be remedied, but which are not within the words of the statute.

The terms, "*forcibly or fraudulently*" in the statute, must be held to have been used in their ordinary sense, and to mean actual force or actual fraud, as distinguished from constructive force or fraud. Accordingly, where the defendant finding a gate upon a plank road open, passed through the same with his team, and on being requested to pay toll declined, saying that he ought not to pay toll as the road was bad, but would do so if B. said he must; and on another occasion he again passed through the gate on finding it open, without paying toll, although informed that B. said he must pay toll, no effort being made by word or deed, on either occasion, to stop him. *It was held*, (Allen J.) that this did not amount to a forcible or fraudulent passing the gate, so as to subject the defendant to the penalty.¹

¹ Mallory vs. Austin, 7 Barb. 626, ² Walker vs. Cruikshank, 2 Hill R. Gridley, J.; 28 Wend. 193; 1 296.
Caine's R. 182.

To constitute a forcible passage of a gate, the passage must be effected by actual force, or by at least offering some violence to overcome, remove or prevent the obstacle created by the gate. To make the passage fraudulent, some artifice must be employed, or some deception practiced on the toll gatherer.²

The rule that a plaintiff is in any event entitled to recover the amount tendered and brought into court by the defendant, does not apply to an action brought to recover a penalty of a fixed amount, and that alone. In such an action, unless the plaintiff recovers the amount of the penalty, he is not entitled to any judgment.³

Where a penalty given by statute for the commission of a fraud, is by the terms of the statute, to be sued for in any court of competent jurisdiction, *for the benefit* of the person upon whom such fraud shall be committed, in the absence of any specification, in terms, by whom the action is to be brought, it must be in the names of the persons for whose benefit the suit is prosecuted, i. e., in the name of the real parties.⁴

It is not necessary that a statute giving a pecuniary penalty or forfeiture, should in terms direct in whose name the action for its money shall be brought. The party injured, in the absence of any provision to the contrary, may bring the action in his own name.

Foreclosure of Liens.

In 1869, the following statute was passed in relation to inn-keepers and boarding house keepers, viz :

§ 1. Any inn-keeper, boarding house keeper, mechanic, workman or bailee, who shall have a lien upon any chattel property, may commence an action in any court having jurisdiction, of the amount of such lien for an enforcement and foreclosure thereof.

¹ The Bridgewater & Utica Plank Road Co. vs. Robbins, 22 Barb. 662; 5 Wheaton, 76; 2 Caine's R. 97; 17 Wend. 257.

13 How. Pr. R. 448; 21 Barb. 212.

³ Canastota, &c. Plank Road Co. vs. Parkill, 50 Barb. 601.

⁴ Thomson and others vs. Howe, 46 Barb. 287; 2 Wait Law and Practice, 284; 4 Denio, 374.

§ 2. Such action shall proceed in all respects as civil actions in the court in which the same is commenced.

§ 3. The judgment in such action may be the same as in other civil actions in the same court, and in addition thereto, if in favor of the plaintiff, may fix the amount of such lien and adjudge the foreclosure of the same, and the sale of the chattel property affected thereby, and specify the officer who shall make such sale, and in such case shall direct the disposition of the proceeds thereof to the payment of the amount of such lien, with the costs of the action, and the costs and expenses of such sale ; and shall provide for the safe keeping of any surplus arising thereon, and the payment thereof to the owner of such chattel property, or his assigns or representatives.

§ 4. There shall be the same right to appeal from the judgment in such action as in other civil actions in the court in which the same shall be commenced.

§ 5. Nothing in this act contained shall be held or construed to affect or impair the right of any person to enforce or foreclose a lien upon chattel property in any other manner than is herein provided.¹

By the terms of the foregoing statute, the proceedings are to be commenced and conducted as in any other civil action, except the complaint should show on what property he claims the lien, and its amount ; and in case the chattel property does not bring enough to satisfy the judgment and costs of sale, on the coming in of the return of the officer appointed by the Justice to make the sale, the Justice may issue an execution in the usual form for the deficiency, reciting the judgment in the execution, and directing the constable to collect the balance, whatever it may be.

I have, therefore, prepared a form for a Justice to insert in his docket, and in case of a sale, the safe course would be to give the officer a true copy of the judgment of foreclosure, duly certified by him to the end he may be empowered to sell the property in pursuance of his directions.

¹ Session Laws of 1869, Ch. 738, p. 469.

IN JUSTICES' COURT—Before Francis Butler, Justice.

THOMAS SNOW	}
<i>ag't</i>	
JAMES BARTON.	

January 4, 1871, issued summons returnable January 12, 1871.

January 12, 1871, summons returned, personally served January 5, 1871.

January 12, parties appeared and answered.

January 12, plaintiff complained that defendant was indebted to him in the sum of \$52.16, for money lent and advanced to defendant, for the security of which he holds a specific lien on a *bay horse of defendant's*, and he demands a judgment for said amount, besides the costs, and a foreclosure of said lien, and a sale of said property according to the statute in such case made and provided.

The defendant denies the said complaint, and gives notice of set-off, (*or as the case may be.*)

On motion of _____ cause adjourned to January 25th inst., at 1 P. M.

January 25th, parties appeared and proceeded to trial. A. B. and C. D. sworn for plaintiff, and H. E. for defendant, (or cause tried by jury.)

Judgment entered for the plaintiff for

damages,	.	.	.	.	.	\$55.80
Costs,	.	.	.	.	.	7.70

Judgment,	.	.	.	.	.	<u>\$63.50</u>
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which amount is a lien upon the bay horse mentioned in the plaintiff's complaint, and it is ordered and adjudged that the said horse, (*or name the chattel,*) be sold at public sale, (*giving notice as in other cases,*) and A. B. (*some constable, naming him,*) is hereby appointed and authorized, to make such sale, and he is hereby authorized and directed out of the proceeds thereof to pay the plaintiff the amount of said judgment and interest, and take his receipt therefor, and also the costs and expenses of such sale, and make his return

of the surplus monies arising from such sale, together with his vouchers thereof, to this court within sixty days from this date.

Dated, New Hartford, January 25, 1871.

F. BUTLER, Justice of the Peace.

In the absence of any statutory provision as to the items of costs and expenses, the officer making the sale may charge and receive in such cases, I am of the opinion he may charge the usual fees, in analogous cases, which may be found under the head of "Fees in Special Proceedings."

It will be observed, the provisions of the foregoing statute are new, and proceedings conducted under it in a proper and legal manner, will save parties much embarrassment and trouble in enforcing liens of various kinds which they may hold upon property.

Under the head of judgments will be found a proper form for a judgment of foreclosure in such cases, and an execution which may be issued upon the same.

CHAPTER III.

Of the Commencement of Actions.

Actions may be commenced before Justices of the Peace either by the voluntary appearance and agreement of the parties, or by process. When by process, it shall be either a summons, a warrant or an attachment. When the name of a defendant is not known to the plaintiff he may be sued by summons or warrant by a fictitious name, and when subsequently in the progress of the suit his true name appears, the Justice should amend the proceedings according to the truth of the matter, and continue them as if the defendant had been sued by his right name.¹

Care should be taken to see that the action is cognizable by the Justice, that his jurisdiction extends to the persons of the plaintiff and defendant, and that the proper place for bringing the action is selected. Every action must be brought before the Justice of the town wherein either

1. The plaintiffs or one of them reside ; or
2. Where the defendants or one of them reside ;
3. Before some Justice of another town in the same county next adjoining the residence of the plaintiff or defendant.

Except in the case of a defendant who has absconded, when it may be brought before a Justice of the town where he or his property is, and where all the plaintiffs are non-residents of the county, or the defendant be a non-resident, in either of which cases it may be brought before a Justice of the town in which the plaintiff or defendant may be.²

Actions shall be considered as *commenced*,—

1. Upon process by warrant, at the time of the arrest of the defendant.
2. Upon process by attachment, or summons, on the day

¹ 2 R. S. 4th ed. 429, § 9; Id. 459, § 282; Code of Procedure, § 64, sub. 11. ² R. S. 4th ed. 459, § 9.

when the process shall be *delivered* to the constable. But if two or more suits be commenced by summons, or attachment, on the same day, the suit in which the process was first served, shall be deemed to have been first commenced. And

3. Where the action is instituted without process, at the time of the parties joining issue.¹

I will treat of each *process* under its appropriate *head*, so that the *reader* may readily perceive the law *applicable* to each case.

All process issued by any Justice of the Peace, *shall* be signed by him, and may be under seal, or without seal.²

No civil process can be issued on Sunday. This includes not only the making it out by the Justice, but also the delivering it to the officer, neither of which can be legally done on that day. Process thus issued would be void. (12 John. R. 178 ; 2 R. S. 175, § 7.)

It should be remarked here, that a Justice should, in *no case*, allow any process to go out of his hands without being *entirely* filled up ; neither can he authorize any person to *alter* the process *in date* or otherwise, except under his *immediate notice*, as will readily be perceived by the following section :

Every summons, warrant, attachment and execution, issued by a Justice of the Peace, *shall* be entirely filled up, and shall have no blank, either in date or otherwise, at the time of its delivery to an officer to be executed. Every such process which shall be issued and delivered to an officer to be executed, contrary to the foregoing provision, *shall* be void.³

By section 236, 2 Revised Statutes, 195, a Justice offending against the 233d section, is guilty of a misdemeanor, and subject to fine, or imprisonment, or both, and a forfeiture of his office.

Where in an action brought before a Justice against a Sheriff for an escape, it becomes material to inquire at the trial at what time the summons, by which the suit was com-

¹ 2 R. S. 4th ed. 429, sec. 10.

² 2 R. S. 194, sec. 232.

³ R. S. 194, sec. 233, Laws of 1820 141, sec. 1, 2, 3.

menced, was issued, and there is evidence tending to show that the summons was illegal and void, by reason of its not having been issued by the Justice in person, but by his clerk in pursuance of his directions; the defendant has a right to have submitted to the jury the questions, what were the instructions given by the Justice to his clerk, and whether they were complete, so as to enable the clerk to issue the summons without the exercise of any discretion on his part, or directions from any other person. If the Court take those questions from the jury and decide that the summons was lawfully issued, the judgment will be reversed and a new trial granted. A Justice of the Peace cannot delegate any part of his official power or authority to another. Yet it seems that *he may* depute another to do a specific act without vesting in him any discretion.¹

Under a similar provision in a former fifty dollar act, passed April 7, 1820, the Supreme Court decided in the *People vs. Smith*, (20 Johns. Rep. 63,) that where a Justice signed a blank summons, and delivered it to the plaintiff, to be filled up *in his presence* and *under his control*, it was not a violation of the statute; but that if it was filled up out of his presence and beyond his control, it would be.²

The same rule would seem to be applicable to the above 233d section.

A general authority by a Justice to a constable to *alter* process would be void, but an authority to alter a particular process would be valid. It is presumed that a Justice would not authorize a third person to alter a particular process unless it was done *in his presence* and under his control.³

The practice of authorizing a constable to alter a process in any particular is neither prudent or discreet in a magistrate, and ought to be discountenanced.

The law having undergone many material alterations within a few years past, in respect to the issuing of process by a Justice, and it being, at the present time, often diffi-

¹ *Borrodaile vs. Leek*, 9 Barbour R. 611, Welles P. J.; 20 John. 63. ² *Pierce vs. Hubbard*, 10 Johns. 405.
³ 2 R. S. 160, sec 13.

cult to determine *what* process to issue, I have deemed it proper to treat of each process separately.

Of the Long Summons.

The summons authorized by the Revised Statutes, which from the interval between its date and return, is usually called a "long summons."

By a long summons, so called, is understood a summons issued by a Justice, returnable not less than *six* nor more than *twelve* days from its date.

The process against freeholders, and against inhabitants having families, except as otherwise hereinafter directed, shall be a summons.¹

Where both parties are *residents* of the county, the long summons is the proper process; so where the *plaintiff* is a non-resident of the county, and does not make the *proof* before the Justice, of his non-residence, &c., and give the security required by law, the *long summons* must issue.

A railroad company may properly be sued in a Justices' Court by long summons, as no provision is made by statute for process by warrant, attachment or short summons against it.²

So also joint debtors may be sued in a Justices' Court, by long summons, though one of them be a non-resident of the county.²

Where, however, a suit was commenced by long summons in the Marine Court of the city of New York, against the *maker* and *endorser* of a note, one of whom resided in the city, and the other in an adjacent county, and the plaintiff took judgment against the latter only, he having been served with the summons more than six days before its return, but not appearing to defend, *held* that the judgment was void, and that the party at whose suit it was obtained, could not justify a seizure of goods under the execution issued upon it.

But in such case the judgment will protect the justice who issued the summons.

¹ 2 R. S. 160, sec. 13.

² 11 Barb. 621; 15 Id. 650.

A summons is the ordinary process of the Court, and issues on the mere suggestion of the plaintiff.¹

The process of warrant or attachment in a Justices' Court is extraordinary, and can issue only on special application, and upon the proof required by law. The mere request of the plaintiff for a summons is equivalent to a *plaint levied* which, according to the old law, was all that was required to give jurisdiction of the person of the defendant. The authority, therefore, of a Justice of the Peace to issue a long summons, on the request of the plaintiff, is as ample as to issue a warrant or attachment upon a special application and proof required by law. In declaring upon a judgment rendered by a Justice in a suit commenced by a long summons, it is not necessary to allege that the defendant was a resident of the county. The summons having been duly issued and served by a constable of the county, the defendant is *prima facie* amenable to the jurisdiction. If in point of fact, the defendant is not a resident of the county, and therefore not amenable to that process, it seems that he should *appear* and take the objection. A person having no legal residence any where, it seems may be sued by long summons. The process is appropriate, unless the defendant is a *non-resident* of the county.²

The case above cited contains much important information, and may be regarded as good law, having been adjudicated in the Court of Appeals, which is the Court of last resort in this State.

It is a general rule, that the time for the appearance of the defendant, served with a summons, issued by a Justice of the Peace, shall be *not less than six nor more than twelve days*, and the summons shall be served at least six days before the time of appearance mentioned therein. This rule is *prima facie* applicable to all cases, unless the party can show to the Justice such facts as will authorize a summons of a different kind to be issued. Where the return of the Justice to a certiorari, shows no fact authorizing him to issue

¹ Barnes vs. Harris, 4 Comstock, ² 4 Comstock, 374.

374, in Court of Appeals, Gardiner J.

a summons returnable in two days, it will be held *prima facie* that a summons thus issued was without authority. It cannot be inferred that the defendant was a non-resident of the county, where there is no fact stated in the return to warrant that supposition. Where the defendant is a non-resident of the county, and the plaintiff is also a non-resident, he is not entitled to a short summons, without proof of that fact, and giving security for the payment of any sum which may be recovered against him.¹

The Revised Statutes provide² that, (§ 112.) If process shall have issued against two or more persons jointly indebted, and shall have been personally served upon either of the defendants, the defendant who may have been served with process, shall answer to the plaintiff; and the judgment in such case, if rendered in favor of the plaintiff, shall be against all the defendants, in the same manner as if all had been served with process; but execution shall issue only in the manner hereinafter directed.

§ 123. Such judgment shall be conclusive evidence of the liability of the defendant who was personally served with process in the suit, or who appeared therein; but against every other defendant it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence.

§ 141. When a judgment shall be obtained against joint debtors, upon process which was not served upon all the defendants, execution may be issued in form against all; but the Justice shall endorse thereon the names of such of the defendants who did not appear in the suit, as were not served with process of warrant, summons or attachment.

§ 142. Such execution shall not be served upon the persons of the defendants whose names are so endorsed thereon, nor shall it be levied on the sole property of any such defendant; but it may be collected of the personal property of any such defendant, owned by him as a partner of the

¹ Allen vs. Stone, 9 Barbour, 60, Cady J. ² 2 R. S. 247, secs. 122, 123. [4th ed. p. 444] Id. 251, secs. 141, 142. [4th ed. p. 447.]

other defendants appearing or served with process, or with any of them.

It will be seen that the effect of this provision is to permit a plaintiff to proceed to judgment upon a joint or partnership demand, on a service upon but one of the defendants, and to render an execution thereon available against the individual property of the defendant served with the process, and the partnership property held by all the defendants. The judgment is also evidence of the amount of the plaintiff's demand as against the defendants not served, when in another action he shall have established the demand against them by other evidence. Thus, if one commence an action against A. and B., and upon service of the process upon A., obtain a judgment pursuant to the statute, for fifty dollars, and he is unable to collect that upon his execution, in an action brought upon the judgment against A. and B., and when B. is served with process, the plaintiff must first prove the former judgment and its amount, then that A. and B. were partners, and thirdly, that they were liable to him upon the claim which was recovered upon in the former action, and this would entitle him to recover the amount of the first judgment and interest. The defendant B. might in this action contest the question of joint liability for the original claim, but that is the extent to which he could go. He could not be permitted to give evidence to reduce the amount claimed.

The provisions of the statute relate only to co-defendants, who are jointly indebted. They have no reference to persons jointly interested as wrong-doers.¹

Form of Long Summons.

— of —, }
ONEIDA COUNTY, } ss.

To any constable of said county, Greeting :

The People of the State of New York command you to summon _____ to appear before me, the undersigned Justice of the Peace, at my office, in the _____ of _____, in the _____

¹ 10 Wend. 630; 11 Id. 612.

said county, on the day of 18 , at o'clock in the
 noon, to answer in a civil action, to damage
 two hundred dollars or under. And have you then and
 there this precept, with your return thereupon, as by law
 required.

WITNESS my hand, the day of 18 .

F. BUTLER, Justice of the Peace.

Since the adoption of the Code, the summons issued by a Justices' Court need not express the plea, as was required by 2 Revised Statutes 228, § 14.¹

The summons must be served at least six days before the time of appearance mentioned therein. It must be served, if the defendant be found, by reading it to him, and (if required) delivering a copy ; and if the defendant be not found by leaving a copy at his last place of abode, in the presence of some one of the family of suitable age and discretion, who must be informed of its contents.²

In computing the time which may intervene between the date and return of the summons, the day of the date should be excluded, and the *return day included*. The same rule prevails in relation to the time between its *service* and return.

Thus, if it be returnable on Friday, it should be issued and *served* as early as the Saturday before. But parts of a day are regarded as whole days in the computation. So a short summons may be dated the first, and issued the afternoon of that day, and returnable the third, at 9 o'clock, A. M., providing it is duly served on the first.

This summons being the usual process issued by a Justice, and the rules applicable to it being plain, nothing farther upon this branch need be *added*.

Short Summons.

The *short summons* differs from the long summons only in the interval between its date and return. It is required to be returnable not less than two nor more than four days from the date thereof, and to be served at least two days

¹ 12 Barb. 21; 11 Id. 657; 16 Id. 96. ² 2 R. S. 160, sec. 15; 10 Wend. 422; 2 Hill, 517.

from the time of appearance mentioned therein.¹ It is provided by the act to abolish imprisonment for debt, as a substitute for a warrant in cases where, before the act, a warrant might be issued in favor of a non-resident plaintiff, or against a non-resident defendant in an action upon contract, whether the defendant reside in another county or out of the state, and the same proof is required to authorize it as was required to authorize the issue of a warrant in a similar case ; and where security was required to entitle the plaintiff to a warrant, it must now be tendered to entitle him to a short summons.²

The section of the act authorizing the short summons to issue, *is as follows* :

Whenever by the provisions of the thirtieth section of this act, no warrant can issue, and the defendant shall reside out of the county, he shall be proceeded against by summons or attachment, returnable not less than *two* nor more than *four* days from the date thereof, which shall be served at least two days before the time of appearance mentioned therein ; and if such defendant be proceeded against otherwise, the *Justice* shall have no jurisdiction of the cause.³

A short summons cannot go in any case against a defendant who is a non-resident of the county, except when the plaintiff's demand arises upon contract express or implied, and then not when it arises on contract in the class of cases, (excepted by the act to abolish imprisonment for debt.⁴)

In case the applicant is a non-resident, then within the case of *Allen vs. Stone*, (9 Barbour, 60, and 4 Comstock, 374,) and many others, he must make the proof and give the necessary security ; and it is absolutely necessary, in all cases of short summons being issued, to require the proof by affidavit of the facts entitling the party to that process.

Where the *plaintiff* is a non-resident, and has a demand against a *resident* defendant, arising upon contract, to obtain a short summons, he must make the proper proof by affidavit before the Justice, and give the requisite security. Such

¹ Sess. Laws 1831, p. 403, sec. 33.

³ Sess. Laws 1831, p. 403, sec. 33 ; 2

² 2 R. S. 4th ed. 460, sec. 210 ; 4

R. S. 202, sec. 292.

Comst. 254, 592.

⁴ 22 Barb. 593 ; 13 Id. 684.

was the evident intention of the Legislature, and such is the construction of the Courts.¹

A short summons in favor of a non-resident plaintiff, may be issued by any Justice of the county, though he and the defendant do not reside in the same town, or in *adjoining* towns.²

The statutory provisions for acquiring jurisdiction over absent defendants from the county, it seems to me, must be strictly complied with, to give the Justice jurisdiction.³

It appears by the 33d section of the Act of 1831, that the short summons or attachment cannot issue against a non-resident defendant, only in cases arising on contract, *where, by its provisions, no warrant can issue.*

The court say, a short summons cannot be issued in any case where a warrant could go under the 30th section of the Act of 1831; hence the short summons or attachment cannot go in any case against a defendant who is a non-resident of the county, except when the plaintiff's demand arises on contract in the class of cases where the warrant cannot be issued, and if that be the case, the affidavit to procure either process should show to what class of cases the demand belongs.⁴

The affidavit should show in what manner the demand arose upon contract, so the Justice could judge whether a warrant could issue or not.⁵

The following form of affidavit may be used on application for a short summons, by a non-resident plaintiff. It should not be entitled in the suit:

ONEIDA COUNTY, SS.—A. B. being duly sworn, saith, that he has, as he believes, a good cause of action arising on contract against C. D., who resides within the county of Oneida, (*being for goods sold and delivered, amounting to \$, or for money lent and advanced to him, as the case may be, stating the facts,*) upon which, according to the provisions of the Act to abolish imprisonment for debt, and to punish fraudulent debtors, no warrant can issue against him and that this deponent is not a resident of said county of

¹ 15 Wend. 652; 5 Hill, 323.

² 3 Hill, 323.

³ 34 Barb. 95.

⁴ Waters vs. Whittemore, 22 Barb. 593, 595.

⁵ Stevens vs. Barton, 39 How. 13; 28 How. 326.

Oneida. This deponent prays a short summons may issue against the said C. D., according to the statute in such case made and provided. A. B.

Subscribed and sworn this day }
of January, 1871, before me, }
F. BUTLER, Justice of the Peace.

Against a Non-resident Defendant.

ONEIDA COUNTY, ss.—A. B. being duly sworn, says, that he has, as he believes, a good cause of action arising on contract against C. D., being for goods sold, &c., (the same as foregoing form,) from which, according to the provisions of the Act to abolish imprisonment for debt, and to punish fraudulent debtors, no warrant can issue against him; and that the said C. D. is not a resident of the county of Oneida; and this deponent prays that a short summons may issue against the said C. D. A. B.

Subscribed and sworn this day }
of January, 1871, before me, }
F. BUTLER, Justice of the Peace.

The Justice should then take security from the plaintiff for the payment of any sum that may be adjudged against him. Security for *costs* merely, is not sufficient.¹

The form of the security to be given by a non-resident plaintiff is as follows:

ONEIDA COUNTY, ss.—Application having been made to , Esq., one of the Justices of the Peace of the said county of Oneida, by a non resident of the said county, for a short summons in his favor, against C. D., upon contract. Now, therefore, for value received, and according to the form of the statute in such case made and provided, I do hereby agree with, and become bound to the said C. D. that he, the said shall pay to the said any sum which may be adjudged against him, in the said action so commenced, by the said short summons. A. B.

Signed, taken and acknowledged, }
the day of 1871, before me, }
F. BUTLER, Justice of the Peace.

¹ 8 Hill, 323, Nelson Ch. J.

Form of Short Summons.

— of — }
 ONEIDA COUNTY, } ss.

To any constable of the said county, Greeting :

The People of the State of New York command you to summon to appear before me, the undersigned Justice of the Peace, at my office, in the of in the said county, on the day of 18 , at o'clock in the noon, to answer in a civil action, to damage two hundred dollars or under. And have you then and there this precept, with your return thereupon as by law required.

WITNESS my hand, the .day of 1871.

Justice of the Peace.

If the plaintiff sues, or the defendant is sued in a particular character, it should be so expressed in the process, whether by summons, warrant or attachment. Thus, if the action be in favor of the plaintiffs as executors, say—

To answer A. B. and C. D., executors of the last will and testament of E. F. deceased.

Of a Surviving Executor ;—to answer A. B., surviving executor of the last will and testament of C. D. deceased.

Of Administrators ;—to answer A. B. and C. D., administrators of all and singular the goods and chattels, rights and credits, which were of E. F., deceased.

Of a Surviving Partner ;—to answer A. B., survivor of A. B. and C. D.

Of Husband and Wife ;—to answer A. B. and C. D. his wife.

Of the Assignees of an Insolvent Debtor ;—to answer A. B. and C. D., assignees of E. F., an insolvent debtor.

Of the Assignee of a Jail Bond ;—to answer A. B., assignee of C. D., Esq., sheriff of the county of Oneida.

Of Overseers of the Poor ;—to answer A. B. and C. D., Overseers of the Poor of the town of Trenton.

In an action brought for a Penalty, a part of which is given to the person prosecuting, and a part to the State, County or Town, or some officer ; to answer A. B., who

sues as well for himself as for the overseers of the poor of the town of Whitestown.

In favor of a Supervisor ;—to answer A. B., supervisor of the town of Remsen.

In favor of the Board of Supervisors ;—to answer the board of Supervisors of the county of Oneida.

In favor of a Sheriff ;—to answer A. B., sheriff of the county of Oneida.

In favor of a Corporation ;—to answer, [here insert the precise name given to the corporation—as, The mayor, aldermen and commonalty of the city of Albany—The president, directors and company of the Bank of Utica, &c.]

If the action be against the defendants in a particular character, similar language is employed in the direction to summon them: as—"to summon A. B., surviving partner of A. B. and C. D.," &c.

The foregoing will be a sufficient guide in describing parties of a particular character.

The plaintiff may, *if he is a constable*, serve his own summons.¹

As the foregoing are the *only* cases in which a short summons can issue, I will dismiss this branch, with the *suggestion* that *great care* should be taken by Justices of the Peace, for the proper observance of the laws which govern them in the discharge of their various responsible, and often complicated duties.

Of the Process by Warrant.

Since the passage of the act to abolish imprisonment for debt in certain cases, passed in 1831, the process by warrant is seldom used in civil cases; but as Justices of the Peace are occasionally called upon to issue this kind of process, it is proper that some plain and practical rules should be laid down for their guidance in the issuing of the same.

1. This process may now issue in all actions arising upon *tort*, in the same manner as it did previous to the passage of that act. *For instance*, if a *non-resident* plaintiff has a

¹ 2 Cowen R. 436.

demand against a *resident* for *trespass* upon *personal property*, or upon *real* property in the county, or in *trover*, for converting his *property*, and in many other cases that might be named ; and should apply to a Justice of the Peace, and should make the requisite proof of his being a *non-resident*, &c., and give the requisite security, as required by *statute*, he would be *entitled* to a warrant against the defendant.

So if a non-resident *plaintiff*, having a demand against a resident defendant, for a *fine* or *penalty* given by *statute*, or for monies collected by him as a public officer, or for any misconduct or neglect in office, should make application as above stated, the *Justice* would be *bound* to issue his warrant against the defendant.¹

And where a person has a demand arising upon tort, or in either of the cases enumerated in the foregoing paragraph, against a non-resident *defendant*, *no* other process can *legally* issue to collect the demand.²

It is perfectly clear, that the Justice is bound to issue his warrant in the case above mentioned, and in all cases arising upon tort in the following cases :

1. Where the defendant is a non-resident of the county.³
2. Where the plaintiff is a non-resident, and tenders to the Justice security for the payment of any sum which may be adjudged against him in the suit.
3. When it shall appear to the satisfaction of the Justice, by the *affidavit* of the applicant, or of any other witness, that the person against whom such warrant is desired, is about to depart from the county, with the intent not to return thereto.
4. Where the defendant is an inhabitant of the county having a family, or a freeholder of the same county, and it shall in like manner, appear to the satisfaction of the Justice, that the plaintiff will be in danger of losing his debt or demand, unless such warrant be granted.⁴

In all these cases, however, on application for a warrant, the person applying *must* make affidavit of the *facts* and *circumstances* within his knowledge, showing the grounds of

¹ 2 R. S. 160, sec. 17.

² Id.; 1 Cow. Tr. 461.

³ 2 R. S. 160, sec. 17.

⁴ 1 Cow. Tr. 461.

his application, whereby the Justice may the better judge of the necessity and propriety of issuing such warrant.¹

The Justice can in *no* case dispense with the proof by *affidavit*, before issuing his warrant.²

To authorize a Justice of the Peace to issue a warrant for trespass against a non-resident, the applicant must, by *affidavit*, state the facts and circumstances within his knowledge, showing the grounds of his application.³

Form of an Affidavit for Warrant in a Case not arising on Contract.

ONEIDA COUNTY, SS.—James Ray being duly sworn, says, that he has, as he verily believes, a good cause of action against John Roe, of , for taking and converting to his own use, the personal property of this deponent, to wit: [here state the goods with reasonable certainty,] which cause of action does not arise upon contract. This deponent further says, that he is not a resident of the county of *Oneida*, but is a resident of the county of *Chenango*, and is willing to give security for the payment of any sum that may be adjudged against him in this suit.

JAMES RAY.

Subscribed and sworn this 1st day }
of August, 18 , before me, }

Justice.

Another Form.

ONEIDA COUNTY, SS.—James Ray being duly sworn, says, that he has, as he verily believes, a good cause of action against John Roe, for taking and carrying away and converting to his own use the goods and chattels of this deponent, to wit: [here state the property,] and this deponent makes application for process by warrant against the said Roe, and says that the said Roe *lately* informed this deponent that he was about to depart from the said county, with intent not to return thereto.

Or, that this deponent will, as he verily believes, be in

¹ 2 R. S. 161, sec. 19

³ Whitney & Shufelt, 1 Denio, 592.

² 1 Wend. 216.

danger of losing his said demand, unless such warrant is issued ; and the facts and circumstances upon which his belief is founded, are as follows : [here state the particular *facts and circumstances.*]

Or, that the said John Roe is not a resident of the said county of *Oneida*.

Or, that he is neither a freeholder nor an inhabitant having a family.

JAMES RAY.

Subscribed and sworn this 1st day }
of August, 18 , before me, }

Justice.

Form of an Affidavit for Warrant arising on Contract.

ONEIDA COUNTY, SS.—John Jones being duly sworn, says, that he has, as he verily believes, a just cause of action against Richard Roe, against whom he makes application for warrant, in pursuance of the statute in such case made and provided. And this deponent further says, that the said cause of action is for money collected by the said Richard Roe in his official character as constable, [Justice of the Peace, or as the case may be,] or that the said cause of action is for official misconduct [or neglect of duty] of the said Richard Roe, as constable [or as the case may be,] or that the said Richard Roe is a non-resident of the county of Oneida, [or any other of the grounds mentioned in the foregoing affidavits.]

JOHN JONES.

Subscribed and sworn this 1st day }
of August, 18 , before me, }

Justice.

The foregoing forms will be sufficient to enable the Justice to draw an affidavit according to the facts, and one that will answer the requirements of the law.

It will be observed that in the foregoing forms of affidavits, the *nature* of the cause of action is *stated*.

This should be done in all cases, in order to show that the demand does not arise upon contract ; or if upon contract, that a warrant is the proper process, being *against public officers, &c.*, as heretofore *stated*.

The facts to be established by the affidavit, are to be spe-

cifically stated, and the Justice should not be satisfied (as is sometimes the case) with the simple expression of the *belief*, or *fear*, that the defendant is about to depart the country, or that he will be in danger of losing his debt, &c. *Facts* should be *disclosed* in the affidavit sufficient to enable the Justice to draw his own conclusion.¹

In a case where the application was for a warrant, the plaintiff, in his affidavit, alleged as the ground of his application, that he *believed* there would be danger of losing his demand, unless a warrant should issue forthwith, *without stating* any facts or circumstances whatever. The Supreme Court held the affidavit *insufficient*. Sutherland J. remarks, the Justice has no *right* to be satisfied with an affidavit in the general terms employed in this case. It states *no facts and circumstances* whereby he could judge of the necessity or propriety of issuing the warrant. Without such specification, he had no right or jurisdiction to issue the process.²

The cases cited are sufficient to show with what care parties should proceed, in resorting to the process by warrant.

Where a non-resident plaintiff obtains a warrant, he should give security ; and the following form is deemed sufficient :

Form of Security to be Signed by the Surety.

ONEIDA COUNTY, SS.—Application having been made by
to , Esq., one of the Justices of the Peace of the
county of Oneida, for a warrant in his favor, against in
a plea of trespass ; Now, therefore, for value received, and
according to the statute in such case made and provided,
I do hereby agree with, and become bound to the said ,
that he, the said , shall pay to the said any sum
which may be adjudged against him, the said in the said
suit commenced, or to be commenced by said warrant.³

JOHN DOE.

Signed, taken and acknowledged }
the day of 187 . }

Justice.

¹ 20 Wend. 77; 1 Cowen's Tr. 463. ³ 2 R. S. 160, sec. 17, sub. 2.

² 13 Wend. 46, Sutherland J.; 6
Wend. 438; 6 Cow. 234.

Form of Warrant.

ONEIDA COUNTY, SS.

The People of the State of New York, to any constable of said county, Greeting :

We command you to take Richard Roe, and bring him forthwith before me, the undernamed Justice of the Peace, at my office in the town of Whitestown, to answer John Jones, in an action of trespass, to his damage of one hundred dollars, and after you shall have arrested the defendant, do you notify the plaintiff thereof. And have you then there this precept. Hereof fail not at your peril.

Witness my hand at Whitestown aforesaid, in said county, the first day of August, 18 .

Justice.

The constable is directed by his warrant to notify the plaintiff of the arrest of the defendant, and the return as we have seen must set forth whether he has or has not notified the plaintiff. The constable should give this notice without unnecessary delay, and in the meantime retain the defendant in his custody. In some cases it would be impossible for the notice to be given, as if the plaintiff should be absent from the county, or the constable should be unable to find him. In such cases the constable ought not to detain the defendant an unreasonable time, but should take him to the Justice and there make his return, setting forth the fact that he has not notified the plaintiff and the reason why. If the circumstances of the case render it proper, the Justice may then, under the provisions of the statute referred to in the next section, require the defendant to remain in custody for twelve hours, during which a further effort may be made to notify the plaintiff. The notice may be in writing sent by a messenger.

The statute further provides that : " When a defendant shall be brought before a Justice on a warrant, he shall be detained in the custody of the constable, until the Justice shall direct his release. But in no case shall the defendant be detained longer than twelve hours from the time he shall be brought before the Justice, unless within that time the

trial of the cause shall be commenced ; or unless it shall be delayed at the instance of the defendant.”¹ It is within the discretion of the Justice to discharge the defendant during the twelve hours. The power, however, ought not to be exercised, except in extreme cases. If the plaintiff is duly notified of the arrest, and fails to appear within a reasonable time, without assigning a good excuse for his absence, and especially if, in addition to this, the Justice is satisfied that the plaintiff is actuated by improper motives and a desire to harrass the defendant, it would be perfectly justifiable for the Justice to direct the release of the defendant.

The period of twelve hours fixed as the time the defendant may be detained after he is brought before the Justice, forms no part of the reasonable time during which the constable may retain him in custody while making a bona fide attempt to notify the plaintiff or to find the Justice. If, however, the defendant should be detained an unreasonable time before being carried before the Justice, or while the constable is endeavoring to find the Justice, or if he should be kept in custody longer than twelve hours after being brought before the Justice, in either case, the constable, and all others engaged in the illegal detention, would be liable in an action for false imprisonment.²

The return is to be endorsed on the process as in other cases, and may be in the following form :

“ The defendant is arrested, and before the court in custody ; plaintiff notified. May 1st, 1871. Const.”

OR, *“ The defendant is arrested, and before the court in custody ; plaintiff not notified. May 1st, 1871.*

Const.”

If there be several defendants, some of whom are not found, add that fact accordingly, thus : “ A. B. and C. D., the other defendants not found.”

The manner of making an arrest, and what constitutes one, has been treated of in a former part of this treatise.

¹ 2 R. S. 229, sec. 25. [4th ed. p. 2 10 Wend. 514.
481, sec. 23.]

Certain persons are privileged from arrest in civil actions. An enumeration of the several classes of persons to which this privilege extends will often be found of importance to a Justice, as it is his duty when he finds that a party is entitled to the privilege to dismiss the proceedings upon which a warrant has been issued. And where a warrant is issued against two defendants, one of whom is entitled to exemption from arrest, the latter may be discharged.¹ In the following cases the privilege is personal :

1. "Members of Congress" "shall in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same."²

2. "Every member of the Legislature" shall be privileged from arrest on civil process, during his attendance at the session of the house to which he shall belong, except on process issued in any suit brought against him for any forfeiture, misdemeanor, or breach of trust, in any office or place of public trust held by him. Each member shall enjoy the like privilege for the space of fourteen days previous to any such session, and also while going to or returning from such session, provided the time of such going or returning do not exceed fourteen days. Each member shall enjoy the like privilege after an adjournment of the Legislature, until its next meeting, when such adjournment shall not exceed fourteen days. Each member shall enjoy the like privilege while absent with leave of the house to which he shall belong. No officer of either house, whilst in actual attendance upon the house, shall be liable to arrest on civil process."³

3. "Ambassadors and public ministers" of a foreign State, or any of their domestics or domestic servants are privileged from arrest, but the privilege does not extend to a citizen or inhabitant of the United States who enters their service, if the debt were contracted before the employment.⁴

¹ 21 Wend. 457.

² Cons. U. S. art. 1, sec. 6.

³ 2 R. S. 154, sec. 6 to 10. [4th ed. p. 369.]

⁴ Burr. 2016. Act of Congress, Ap. 30, 1790.

The act of Congress imposes a penalty for arresting the servant of a foreign minister, if his name has been registered pursuant to its provisions, but the servant's liability to or exemption from arrest, depends upon the fact of his service and not upon the registry. The protection extends to all persons in the minister's actual service, as his secretary or chorister, and whether they lodge in or out of his house. But a person pursuing a trade or other business on his own account, cannot be considered as a servant.¹ Consuls are not considered ministers, nor within the exemption.

4. "Officers of courts" during the actual sitting of their courts. The statutory provision is as follows: "All officers of the several courts of record shall be liable to arrest, on any process against the body, and may be held to bail, in the same manner as other persons, except during the actual sitting of any court of which they are officers; and when sued with any other person, such officers shall be liable to arrest, and may be held to bail as other persons, during the sitting of the court of which they are officers; but no attorney, or counselor, or solicitor, shall be exempt from arrest during the sitting of the court of which he is an officer, unless he shall be employed in some cause pending and then to be heard in such court."²

5. "A woman" cannot be arrested in an action on contract. The provision is as follows: "No female shall be imprisoned on any process in any civil action founded upon contract."³

6. "A voter" at an election or town meeting on the day in which it is held.

7. "Militia men," from the rising of the sun to its setting, on the day of a parade.⁴

8. "Non-commissioned officers, musicians and privates of the army of the United States," for any debt under twenty dollars, contracted before enlistment, or for any debt whatever, contracted after enlistment, "non-commissioned officers, musicians, seamen and marines," enlisted in the service of

¹ 3 Term, 79.

³ Id. 428, sec. 9. [4th ed. p. 672.]

² 2 R. S. 290, sec. 86. [4th ed. p. 476, sec. 74.]

⁴ 1 R. S. 303, sec. 27. [4th ed. p. 610, sec. 28.]

the United States, during their term of service, for any debt or contract.¹ This provision has been held not to extend to midshipmen in the navy, as they are not enlisted.

9. "Parties to a suit, jurors, &c.," in going to, attending upon, and returning from court;² bail attending court to justify, and all other persons having any relation to a cause which calls for their attendance at court, whether their presence be compulsory or not, to the same extent, going, remaining, and returning.³ And upon the same principle, a next friend or guardian, admitted to prosecute or defend for an infant, going, returning, &c., would be privileged from arrest. Where a suitor, during a *bona fide* attendance at the sittings in which his cause was to be tried, was arrested before the actual day of trial, in a coffee house adjacent to the court, the arrest was held unlawful.⁴ So, where a suitor attending a cause which was postponed early in the day, continued in court until five o'clock in the afternoon, and retired to a tavern, where he was arrested during dinner, he was held entitled to his privilege.⁵ A party is not bound to go the nearest way home in order to avail himself of his privilege, if he do not abuse it for the purpose of going about other business of his own, the burthen of showing which is upon the plaintiff. Thus, when a party returning from attendance in a court of justice, left the court at five o'clock, arrived at his office of business at twenty minutes after five, left it at seven, and, in going along the street towards his house, went into a shop, where he was immediately arrested, it was held that he was privileged. And a party coming from another place than that in which the court sits, is protected while at his lodgings, as well as when going to or returning from court. This privilege extends to a party to an action which has been referred to the decision of the court upon a case stated, while going to, attending, or returning from court; or while attending an appeal from another county to the Supreme Court; or while attending before an arbitrator under a rule of court; or

¹ 3 Rev. Laws U. S. 97, July 11, 1798, ch. 89, sec. 5.

² Gr. Pr. 129.

³ 1 H. Bl. 636.

⁴ 11 East, 439.

⁵ 2 Bl. 1113.

before inferior courts ; or for the purpose of opposing an insolvent's discharge ; or under a recognizance to attend the Court of General Sessions ; or before arbitrators under the statute ; or before referees, although in the latter case it extends only during the hearing, and a reasonable time after, to enable the party to return to his residence, and does not embrace the time in which the party is occupied in preparing papers to move to set aside the report.

10. "Witnesses" subpoenaed to attend any court or officer. As the exemption in these cases is now regulated by statute, all of its provisions are here given.¹

"Every person duly, and in good faith, subpoenaed as a witness to attend any court, officer, commissioner, or referee, or summoned to attend any judge, officer or commissioner, in any case where the attendance of such witness made by law be enforced by attachment, or by commitment, shall be exonerated from arrest in any civil suit, while going to the place where he shall be required by such subpoena to attend, while remaining at such place, and while returning therefrom.

§ 52. The court or officer before whom any person shall have been, in good faith, subpoenaed to attend as a witness, shall discharge such witness from any arrest made in violation of the last section ; and if such court shall have adjourned before such arrest was made, or before application for such discharge be made, any judge of such court shall have the same power to discharge such witness.

§ 53. Every officer authorized to perform the duties of Supreme Court Commissioner, and the Judges of County Courts, shall have the like authority to discharge any witness arrested contrary to the foregoing provisions.

§ 54. Every arrest of a witness made contrary to the foregoing provisions, shall be absolutely void, and shall be deemed a contempt of the court issuing the subpoena ; and every person making such arrest shall be responsible to the witness arrested, for three times the amount of the damages which shall be found by the jury, and shall also be liable to an action at the suit of the party who subpoenaed such wit-

¹ 2 R. S. 401. [4th ed. p. 647.]

ness, for the loss, hindrance and damages sustained by him in consequence of such arrest.

§ 55. But no sheriff or other officer or person shall be so liable, unless the person claiming an exemption from arrest, shall, if required by such sheriff or officer, make an affidavit stating: 1. That, he has been legally subpœnaed as a witness to attend before some court or officer, specifying such court or officer, the place of attendance, and the cause in which he shall have been subpœnaed; and, 2. That he has not been subpœnaed by his own procurement, with the intent of avoiding the service of any process; which affidavit may be taken by such officer, and when so taken, shall exonerate such officer from all liability for not making such arrest."

11. "Canal officers." The provision is as follows: "No acting commissioner, superintendent of repairs, collector or lock-keeper, on any canal shall be held to bail, or taken by warrant in any civil suit for any act done, or omitted to be done by him, in the exercise of his official duties."¹

In the following cases the privilege is temporary. No person can be arrested on civil process on Sunday. An arrest on that day would be absolutely void, and render the officer and all concerned in it liable for false imprisonment.² If a person be detained against his will on Sunday, to be served with process on Monday, the service will be void;³ so if he be brought into the State on criminal process as a mere pretext and detained over Sunday to be arrested.⁴ But if a defendant escape from an officer, he may retake him on Sunday.⁵

The non-residence of *one* of two plaintiffs is not enough to authorize the issuing of a warrant.⁶

Process by Attachment.

The process by attachment was given in certain cases by the Revised Statutes, and was extended to other cases in

¹ 1 R. S. 224, § 48. [4th ed. p. 480, § 61.]

² 1 R. S. 675, sec. 69. 4th ed. vol. 2 p. 83.]

³ Anstr. 85.

⁴ 10 Wend. 636.

⁵ 7 John. 155.

⁶ 1 Cow. Tr. 70.

1831. Since that time the several statutes have undergone some alterations, which I shall notice particularly in this work. Much difficulty has been experienced, and many errors have been committed by Justices of the Peace, before whom causes *commenced by attachment* have been brought, in consequence of not having before them these different statutes, so as to ascertain what these particular alterations and amendments were, and thus be enabled to act understandingly and according to law.

Perhaps no portion of the practice applicable to Justices' Courts, is more difficult to be understood, or more complicated than that portion relating to the issuing, service and return of attachments.

When application for this process is made to a Justice, great care should be taken to distinguish and discriminate between the *different* cases embraced within these respective statutes to which I have referred ; for although the proceedings relative to the issuing service, return, &c., of these attachments, are, in many particulars, alike, yet there are many points of difference which will be pointed out in this work, worthy of attention and strict observance, in conducting to final judgment causes commenced by this kind of process.

1. There are two kinds of attachments which a Justice may issue, viz : a *long* attachment, and a *short* one. The long attachment *must* be made returnable, not less than *six* nor more than *twelve* days from its date ; while the short attachment *must* be made returnable not less than *two*, nor more than *four* days from its date.

Long Attachment.

The Revised Statutes of 1830, authorized an attachment to be issued "whenever it was made to appear to the satisfaction of the Justice to whom the application was made, that the debtor had departed, or was about to depart from the county where he last resided, with intent to defraud his creditors, or to avoid the service of civil process, or that he kept himself concealed with the like intent."¹

¹ 2 R. S. 162, sec. 26.

By that statute, the proof to be made to the Justice, had to be made by two disinterested witnesses, before the attachment could be issued.

The Legislature in 1831, passed an act dispensing with the necessity of producing two witnesses to state the facts and circumstances, &c., and allowed the plaintiff, or any person who made application for him, to make the necessary proof by his own *affidavit*, and that is the only alteration in relation to the Revised Statutes of 1830 ; so that attachments may now be issued under that statute, in the *same* manner as in 1830, with only this variation—the applicant does not have to produce *two* witnesses, his own affidavit being sufficient.¹

The section of the statute under which the foregoing can issue, is as follows, viz :²

“An attachment against the property of any debtor may be issued on the application of a creditor, in the manner hereinafter prescribed, whenever it shall satisfactorily appear to the Justice, that such debtor has departed, or is about to depart from the county where he last resided, with intent to defraud his creditors, or to avoid the service of any civil process, or that such debtor keeps himself concealed with the like intent.”

The demand must arise upon *contract*, express or implied, or upon a *judgment* for one hundred dollars, or any less sum.³

In 1831, the Legislature passed an act authorizing an attachment to issue in certain cases, in *addition* to the cases of which I have already spoken. This act was amended in 1842, and now reads as follows :⁴

“In addition to the cases in which suits may now be commenced before Justices of the Peace by attachment, (the cases above mentioned,) any suit for the recovery of any debt, or damages arising upon any contract, express or implied, or upon any judgment for one hundred dollars or less, may be so commenced, whenever it shall satisfactorily appear to said Justice, that the defendant is about to remove

¹ Sess. Laws 1831, chap. 300, sec. 35. ³ 2 R. S. 162, sec. 27.

² 2 R. S. 162, sec. 26.

⁴ Sess. Laws 1842, p. 74.

from the county any of his property with intent to defraud his creditors, or has assigned, disposed of, or secreted any of his property with the like intent, whether such defendant be a resident of this State or not."¹

It will readily be perceived by these two statutes, which are the only ones authorizing the long attachment to issue, in what cases they can legally issue, viz :

If an attachment is applied for, on the ground that the defendant has departed the county, or is about to depart, with the intention of defrauding, &c., then the attachment is to be issued in pursuance of the Revised Statutes of 1830.

If for fraudulently assigning, disposing of, or secreting, &c., then it is to be issued in pursuance of the statute of 1831, as amended by the act of 1842.

I will next consider what kind of *proof* is required to authorize an attachment under either of the *sections* above cited, for the nature of the proof is the same in both cases.

Great care should be taken in the preparation of the affidavit. An attachment is an extraordinary and summary process given only in extreme cases, and for this reason it is necessary that every requisite to warrant its issue should be strictly complied with. The creditor or his agent should inquire into, and ascertain fully the facts, either from personal observation or the information of those who know them. He will then be able either to state the facts in his own affidavit, or to give the Justice the names of witnesses by whom to prove them, and obtain from him a subpœna to compel them to come before him and make affidavit if they should refuse voluntarily to do so. The Justice is bound, upon request, to issue a subpœna to compel their attendance forthwith.² When all the affidavits are ready, the Justice should then examine them, and if they contain only information at second hand, or general rumor, or the belief of the parties making them, and not a statement of facts and circumstances within their knowledge, from which he can, irrespective of their opinions, or his own personal knowledge, form a belief that the acts of the debtor come within the

¹ Id. chap. 107, p. 74, sec. 34.

² 2 R. S. 230, sec. 28. [4th ed. p. 481.]

provisions of the Revised Statutes, or the act to abolish imprisonment for debt, as the case may be, he should refuse to issue an attachment.

The rule laid down in the foregoing sections is well illustrated in the opinion of Chief Justice Savage in the case of *Smith v. Luce*.¹ The case arose under the act to abolish imprisonment for debt. The affidavit upon which the attachment was issued, stated that the defendant was indebted to the plaintiff in a specified sum over and above all discounts, and that "deponent believes that said J. S. is about to remove, or has removed from said county his property with intent to defraud his creditors, or has assigned, disposed of, secreted, or is about to assign, dispose of, or secret his property with the like intent." The court say, "the plaintiff was bound to prove to the satisfaction of the Justice the facts and circumstances which entitled him to the attachment. These facts and circumstances are, 1st. That the plaintiff has such a demand as the statute describes; and 2d. That the defendant is about to remove his property, or has assigned, disposed of, or secreted it, or is about to do so, with intent to defraud his creditors. The affidavit is defective as to the origin of the demand; it should state that it was *upon contract or upon judgment*. It is also defective in omitting to state the facts and circumstances from which the plaintiff draws the conclusion that the defendant is about to do the acts which he specifies. The plaintiff's own belief is neither a fact or circumstance upon which the Justice can exercise his judgment. It is not sufficient that the plaintiff is satisfied of the unlawful acts or intentions of the defendant. The Justice must be satisfied, and he must be so satisfied from proof of facts and circumstances; not the belief of any one. Facts must be shown to the Justice which shall leave no reasonable doubt on his mind that the defendant has committed, or is about to commit the fraudulent acts mentioned in the statute. For instance, had the affidavit stated positively that the defendant had declared his intention to remove his property to avoid the payment of his debts, or that he had assigned or secreted his property, being

indebted at the time, and setting forth the circumstances, such as want of consideration for an assignment, or any other circumstances which usually indicate fraud, such an affidavit would be proof upon which the Justice could act judicially, and draw his own conclusion whether the defendant had done the acts, or was about to do them, which would authorize the issuing an attachment. It is argued that it is enough if the Justice is satisfied. I answer he must be satisfied judicially, and he has no right to be satisfied unless upon legal proof of facts and circumstances, not belief alone."

In another case where the application for an attachment was made under the same act, an affidavit stating that the defendant had executed a mortgage of a part of his property and refused to confess a judgment or give security for the demand, and declared a determination to manage his property himself, was held not sufficient proof, although there being "some evidence" upon which the Justice acted, the judgment was upheld as valid until reversed.¹

The subpoena to compel the attendance of witnesses to appear before the Justice and make affidavit of the facts within their knowledge upon the application may be in the following form :

ONEIDA COUNTY, SS.

To John Smith and Thomas Smith, greeting :

In the name of the people of the State of New York, you are hereby commanded forthwith personally to appear before the subscriber, a Justice of the Peace of said county, at my office in the city of Utica, to make affidavit of the facts and circumstances within your knowledge touching an application made to me by James Jackson, for an attachment against the property of Richard Roe.

Given under my hand, May 1, 1871.

M. M. JONES, Justice of the Peace.

"The Magistrate" should be able to decide judicially, that is, from facts laid before him by the "affidavit," whether the attachment should issue.

¹ 20 Wend. 77; 15 Wend. 461.

This is required by the statutes, and should be strictly complied with.¹

If the affidavits do contain facts and circumstances tending to establish a case provided for, and the Justice decides it is sufficient, although an Appellate Court might deem them insufficient, the decision will protect the Justice and those acting under it until it is reversed.²

The insufficiency of the proof contained in the affidavits may be taken advantage of before the Justice, on a motion to quash the attachment, or if there be no appearance of the defendant before the Justice, and consequently no waiver, the defendant might avail himself of it upon appeal. Where the affidavit contains facts tending to establish a case for attachment, but not sufficient, the objection should be taken before the Justice, for by pleading without objection the insufficiency might be waived.

In the case of *Tallman v. Bigelow*, the plaintiff, in his affidavit for an attachment, stated that he "believed" that the defendant had departed from the county with intent to avoid his creditors, or to avoid the service of any process, and from "reports and information, he believed," that he kept out of the county to avoid paying his debts.³

"The affidavits of two witnesses," (this was under Revised Statutes,) were produced, who testified that they had been informed that the defendant had departed from the county, and "as his creditors said," for the purpose of defrauding his creditors, and that he remained out of the county, as they believed, for the same purpose. Upon this an attachment was issued, and "judgment was obtained." The court held the affidavits insufficient, and "reversed" the judgment.⁴

Where an application is made to a Justice of the Peace for an attachment on the ground that the defendant "has left the county" where he last resided with intent to defraud

¹ Sess. Laws 1842, p. 74.

² 10 Wend. 420.

³ 10 Wend. 420; 20 Wend. 77.

⁴ This proceeding was under the Revised Statutes, and before the repeal of that part of the 28th sec. 2, R. S 162, which required the oath of two witnesses, as before stated.

his creditors, the plaintiff must state the grounds of the application in his own affidavit, and then he must prove "the facts and circumstances" to establish such grounds, either by his own affidavit, or that of some other person or persons.

Where an attachment is issued under the Revised Statutes it is not necessary or proper to issue a summons upon the return of the attachment, but should enter judgment upon the attachment.¹

An affidavit on an application for an attachment in a Justices' Court, in which the facts are stated upon the belief only of the deponent, is fatally defective, and such defect, if objected to by the defendant before pleading, may be taken advantage of "on certiorari," though the defendant pleaded to the action after the objection was overruled.²

If the defendant had pleaded without taking the objection, the defect would have been waived.³

The affidavit required by the statute, (Laws 1831, p. 404, § 35,) to authorize a Justice of the Peace to issue an attachment, need not be signed by the deponent. If the witness be sworn, and the Justice takes down and certify the testimony, it is sufficient affidavit.⁴

Where the bond executed upon an application for an attachment, professed to be the bond of the creditor who applied and of two sureties, and was executed thus: "W. S., agent for J. S., principal," the sureties executing in proper form, *held* sufficient, although the principal was not bound.⁵

The provision requiring a bond to be executed as one of the conditions to the issuing of an attachment, (Laws of 1831, 404, § 35,) is not satisfied by the execution of a covenant to pay \$100, or to pay all damages and costs, &c., and where only such a covenant is executed, the Justice does not acquire any jurisdiction to issue an attachment.⁶

¹ 16 Barb. 367; 11 Id. 520.

³ 3 Hill, 180, 499; 5 Id. 428; 5 Id.

² Dewey vs. Green, 4 Denio, 63; 1 Barbours, S. C. Rep. 552, Beardsley, J.

181; 14 John. 481.

⁴ Millius vs. Shafer, 4 Denio, 60.

⁵ Id.

⁶ 1 Denio, 184.

The application for attachment may be in the following form :

To M. M. Jones, Esq., one of the Justices of the Peace of the city of Utica, in the county of Oneida :

I, James Ray, hereby make application to you to issue an attachment in my favor, [OR, in favor of John Doe,] against the property of Richard Roe, according to the provisions of article second, title fourth, chapter second, part third of the Revised Statutes, [OR, according to the provisions of the act to abolish imprisonment for debt, and to punish fraudulent debtors.] Dated May 1, 1871.

JAMES RAY.

[or James Jackson, agent (or att'y) for John Doe.

It is desirable that the application in this manner specify the provision under which the application is made.

The affidavits to accompany the application, if made under the Revised Statutes, must be, 1st. An affidavit of the creditor or his agent, in which shall be specified, as near as may be, the sum in which the debtor is indebted over and above all discounts, to the person in whose behalf application is made, and the grounds upon which such application is founded ; and 2d. An affidavit of the plaintiff, or of some other person or persons, of the facts and circumstances to entitle him to the attachment.¹

In case the facts and circumstances are within the knowledge of the plaintiff, all the statements required under each head may be embodied in his affidavit, or that of his agent. If, however, they are not within his knowledge, they must be proved by the affidavits of other persons, but in this case the plaintiff or his agent must make the affidavit, specifying the sum in which the debtor is indebted, and the grounds of the application. This cannot be dispensed with in any case.

The following is the form for the affidavit required to be made by the creditor or his agent "under the Revised Statutes."

ONEIDA COUNTY, SS.—James Jackson being duly sworn,

¹ 2 R. S. 230, sec. 28; Laws of 1831, chap. 300. sec. 35; [4th ed. R. S. p. 431, sec. 26, p. 461, sec. 212.]

saith that [he is the agent of John Doe, and that] Richard Roe is justly indebted to this deponent [OR, to the said John Doe] on a demand arising upon contract amounting, as near as this deponent can estimate, the same over and above all discounts, to \$—; and that the grounds upon which the application for an attachment against the property of the said Richard Roe, which accompanied this affidavit is founded, are that the said Richard Roe has departed [OR, is about to depart] from the said county of Oneida, where he last resided, with intent to defraud his creditors, or to avoid the service of any civil process, [OR, that the said Richard Roe keeps himself concealed with the intent to defraud his creditors, or to avoid the service of any civil process.]

If the facts and circumstances furnishing the grounds of the application are known to James Jackson, they can be detailed as follows :

And this deponent further saith, that about nine o'clock last evening deponent met the said Richard Roe, and held a conversation with him, in which the said Richard spoke of his being in embarrassed circumstances and unable to pay his debts, and in substance said the only way he knew of to save what property he had was to run away or leave the county ; that this morning said Richard's house was empty, he and his family having, during the night, left with most of his furniture.

OR—that said Richard is in embarrassed circumstances ; that he has recently been sued by several of his creditors ; that within a few days past he has been selling such articles of property as he had which would be difficult of removal ; that deponent this day called upon him and requested him to pay his said demand, or to turn out to him property for it, both of which he refused to do, and declared that he would soon be in a place where his creditors could not find or annoy him, or words to that effect.

OR—that said Richard is in embarrassed circumstances ; that his family reside in a dwelling house in Oneida, in which the said Richard has a large amount of personal property liable to be levied upon by execution ; that three or four days since deponent requested him to pay the demand

which he refused to do, and since then deponent has several times called at his house for the purpose of finding him, but has been unable to get a sight of him.

JAMES JACKSON.

[OR, James Jackson, agent for John Doe.]

Sworn before me the 1st day {
of May, 1871.

M. M. JONES, Justice of the Peace.

Where the application is made pursuant to the provisions of the "Act to abolish imprisonment for debt," the affidavit may be in the following form :

ONEIDA COUNTY, SS.—James Jackson being duly sworn, says that Richard Roe is justly indebted to this deponent [OR, to John Doe] upon a demand arising upon contract [OR, upon a judgment] in the sum of ninety-nine dollars, over and above all discounts which said Richard Roe may have against him, as nearly as deponent is able to estimate the same, and that the application for an attachment against said Richard Roe, which accompanies this affidavit is made on the ground that the said Richard Roe is about to remove his property from the said county of Oneida with intent to defraud his creditors ;

OR—on the ground that the said Richard Roe has assigned, disposed of, or secreted his property with intent to defraud his creditors ;

OR—on the ground that the said Richard Roe is about to assign, dispose of, or secrete his property with intent to defraud his creditors. And this deponent further saith, [here set forth the facts and circumstances bringing the case within either of the foregoing grounds, and which prove a fraudulent intent, if within the knowledge of the person making the affidavit, in the manner they are stated in the affidavit in the previous form, and conclude in the same manner.]

JAMES JACKSON.

Before the attachment issues, the applicant must execute to the defendant, and deliver to the Justice a bond with sufficient surety to be approved by such Justice (in writing upon the bond,) in the penalty of two hundred dollars, conditioned to pay the defendant "all damages and costs" which

he may sustain by reason of issuing such attachment, if the plaintiff fails to recover judgment thereon; and if such judgment be recovered, that such plaintiff will pay the defendant all moneys which shall be received by him from any property levied on by such attachment, over and above the amount of such judgment, and interest and costs thereon.¹

The bond may be executed by the plaintiff, or some one in his behalf, with surety.

A deposit of money with the Justice to the amount of the penalty of the bond, or indeed to any amount, would not be sufficient. As the statute prescribes the form of the security, a regular bond in the terms of the statute must be given.²

Its form may be as follows:

Form of a Bond for Attachment.

Know all men by these presents, that we, John Doe, of Whitestown, and Richard Roe, of the same place, are held and firmly bound unto Peter Roe, in the sum of two hundred dollars, to be paid to the said Peter Roe, or to his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the 1st day of August, 18 .

Whereas, application has been made by the above bounden John Doe, to , Esq., a Justice of the Peace of the town of , in the county of Oneida, for an attachment against the property of the said Peter Roe, in favor of the said John Doe, in pursuance of the provisions of the act to abolish imprisonment for debt (or as the case may be): now, therefore, the condition of this obligation is such, that if the said John Doe shall pay the said Peter Roe all damages and costs, which he may sustain by reason of the issuing of said attachment, if the said John Doe shall fail to recover judgment thereon; and if such judgment shall be recovered, and the said John Doe shall pay the said Peter

¹ 2 R. S. 162, sec. 29

² 18 John. 481.

Roe all moneys which shall be received by him from any property levied on by such attachment, over and above the amount of such judgment, and interest and costs thereon ; then this obligation to be void—otherwise of force.

JOHN DOE, [L. s.]
RICHARD ROE, [L. s.]

Sealed and delivered }
in presence of }

W. S.

I approve of Richard Roe as surety in the foregoing bond.
August 1, 18 . Justice.

On receiving the necessary proof and security, the attachment is to be issued, which must state the amount sworn to by the applicant, and must also be made returnable not less than six, nor more than twelve days from its date.¹

It may be in the following form, which will answer under *either statute*.

Form of Attachment.

ONEIDA COUNTY, ss.

The People of the State of New York, to any Constable of said county, Greeting :

Whereas, John Doe has made application to me, , Esq., one of the Justices of the Peace of said county, for an attachment in his favor, against the property of Peter Roe, for a debt of sixty dollars and ten cents, being the amount sworn to by the applicant, which debt arose upon contract ; and the requisite proof by affidavit, and a bond with sufficient surety having been made and executed ; you are therefore commanded to attach so much of the goods and chattels of the said Peter Roe as will be sufficient to satisfy such debt, and safely keep the same, in order to satisfy any judgment that may be recovered on this attachment ; and do you make return of your proceedings hereon to me, the said Justice, at my office, in the town of Whitestown, on the 1st day of August, instant, at two o'clock in the afternoon, and have you then there this precept.

¹ 2 R. S. 163, sec. 30.

Given under my hand at the place aforesaid, the first day of August, 18 .

The attachment may be amended by the Justice, even after service and return, by inserting the amount of the debt sworn to by the applicant.¹

Short Attachment.

This process is authorized by the act to abolish imprisonment for debt, passed in 1831, "and can be" legally issued only against a non-resident of the county where it issues. It may, therefore, issue in any county of this State, except the county where the defendant resides.

This process is authorized by the following section of the act :

"Whenever, by the provisions of the thirtieth section of this act, no warrant can issue, and the *defendant* shall reside out of the county, he shall be proceeded against by *summons or attachment*, returnable not less than two nor more than four days from the date thereof ; which shall be served at least two days before the time of appearance mentioned therein ; and if such defendant be proceeded against otherwise, the Justice shall have no jurisdiction of the cause."²

In several of the earlier cases, the Supreme Court have, in several instances, decided that a short attachment under the foregoing section of the statute might be issued without any affidavit or bond being made. (See 15 Wend. 479 ; 23 Wend. 336 ; 5 Hill, 264 ; 6 Hill, 311.) The Court of Appeals, however, has overruled those decisions, and decided that in all cases where a short attachment is issued, it is necessary to make the requisite proof by affidavit, and give security by bond, and it may now be regarded as settled that no attachment can regularly issue without the preliminary proofs, &c., being made.

The applicant is, however, entitled to a short attachment in all cases where he has a demand arising upon contract, *liquidated* or subject to *liquidation*, and the defendant is a non-resident of the county where the same is issued. The

¹ 14 Wend. 280.

² Sess. Laws 1831, p. 403, sec. 88.

decision of the Court of Appeals establishes the following, that—

In order to procure an attachment from a Justice of the Peace against a non-resident of the county, under the 33d section of the act to abolish imprisonment for debt, a bond with security must be given by the applicant. The case of *Clark vs. Luce*, (15 Wend. 480.) holding a contrary doctrine, overruled.¹

To authorize the issuing of an attachment by a Justice of the Peace, against a non-resident, pursuant to the 33d section of the act to abolish imprisonment for debt, the party applying for the process must make an affidavit of the fact of non-residence, and execute the bond required by the Revised Statutes, on application for an attachment before a Justice of the Peace.²

It has been decided in a recent case that an affidavit showing the non-residence of the defendant, and that the plaintiff has a demand against him arising on contract, not for the recovery of money collected by a public officer, for official misconduct or neglect of duty, nor for damages for misconduct or neglect in any professional employment, is necessary in order to entitle the applicant to a short summons.³ The same rule, from the nature of the case, must apply to a short attachment. Such an affidavit should, therefore, be made. It may be in the following form :

ONEIDA COUNTY, ss.—James Jackson being duly sworn, saith that Richard Roe is indebted to deponent [OR, to John Doe, whose agent deponent is,] in the sum of dollars, above all discounts in his favor, as nearly as deponent can estimate the same ; that the indebtedness arises upon contract [OR, upon a judgment founded on contract] and that it was not for the recovery of money collected by any public officer, nor for official misconduct or neglect of duty, nor for damages for misconduct or neglect in any professional employment ; and that the said Richard Roe resides out of the county of Oneida.

JAMES JACKSON.

¹ *Bennett vs. Brown*, 4 Comstock, 254, Gardner J.

² *Taylor vs. Heath*, 4 Denio, 592, Beardsley J.

³ 13 Barb. 634.

Sworn and subscribed before me, }
May 1, 1871. }

M. M. JONES, Justice of the Peace.

It will be prudent in all cases for the affidavit to be accompanied with an application in writing for the attachment, which may be in the form given in the usual form.

The short attachment is in all respects similar to the long attachment, excepting in the length of the time between its date and its return. This must be not less than two nor more than four days.

A Justice should be very careful to see that each of the requirements of the statute as a condition for issuing particular process, should be strictly complied with, not only with a view to render valid the proceedings thereupon for the benefit of the parties, but for his own protection. If he fails to follow the directions of the statute in any particular necessary to give him jurisdiction, he renders himself liable as a trespasser for any act done under his process; as if he should issue an attachment without the oath or bond required.

The forms heretofore given, for the issuing of attachments and the giving of a bond, may be used in these cases.

The service and return of the process should be made as in other cases, of which I shall treat hereafter.

It is proper here to remark, that when a demand arises from a trespass, or tort, or for a penalty or forfeiture, an attachment cannot issue, nor can it be issued in any case where the suit must necessarily be brought against the defendant in a representative character, as executor, &c.

Of the Service of Process.

A long summons shall, in all cases, be served at least six days before the time of appearance *mentioned* therein. If the defendant shall be found, it shall be served by reading the same to him, and (if required by him) delivering a copy thereof. If the defendant shall not be found, it shall be served by leaving a copy thereof at the defendant's last place of abode, in the presence of some one of the family, of suit-

able age and discretion, who shall be informed of its contents.¹

A constable's return to a summons issued by a Justice, must state the *time* as well as the *manner* of service.²

A constable's return as follows : " Personally served May 14th, 1822," was held to be a sufficient return within the statute.³

" In case of a short summons," it must be served at least *two* days before the time of appearance mentioned therein, and served in the same manner as a long summons.⁴

" In case of a warrant," it is enacted that—

" Every constable serving a warrant, shall return thereupon, in writing, the manner in which he executed the same, and the fact whether he has or has not notified the plaintiff."⁵

The constable serving a summons shall return thereupon, in writing, the time and manner in which he executed the same, and sign his name thereto.⁶

If a summons is personally served, and a copy is required by, and left with the defendant, it would be well that the return be as follows :

" Personally served, and a copy left with defendant at his request. August 1, 18 . Const."

If the service be by leaving a copy at the defendant's last place of abode, a return of service, by copy being left with defendant's wife, would be sufficient, thus :

" Served by leaving a copy at defendant's house, with his wife. August 1, 18 . Const."

The statute requires when the summons is served by copy, that the copy shall be left at the last place of abode of the defendant in the presence of some one of the family of suitable age, who shall be informed of its contents.⁷

Mr. Cowen, in his valuable *Treatise*, has given forms for the return of a constable, leaving a copy, where no person can be found at the last place of abode of the defendant, with whom to leave the copy. It strikes me, however, that

¹ 2 R. S. 160, sec. 15; 10 Wend. 422. ⁴ Sess. Laws, 1831, p. 403, sec. 33.

² Bromley vs. Smith, 2 Hill, 517; ⁵ 2 R. S. 161, sec. 22.

17 Wend. 517.

³ 2 Cow. R. 418. ⁶ 2 R. S. 160, sec. 16.

⁷ 2 R. S. 160, sec. 15.

it would be no service to leave a copy, without some person could be "found with whom to leave it," as it would be a clear evasion of the statute.

Personal service upon the managing agent of a corporation is personal service upon the corporation—and if the constable's return shows such a service, the jurisdiction of the Justice is established, and his judgment will be regular upon its face.¹

The constable should be careful to state in what manner he served the process, that the Justice may see whether there has been a good service; as an appearance before the Justice, for the purpose of making an objection to the sufficiency of a return, is not a waiver of the defect.²

A constable is required to execute the attachment, if a long one, at least six days before the return day; if a short one, at least *two* days before the time mentioned therein for the appearance of the defendant, by seizing the property, making an inventory thereof, and leaving a copy of the attachment, and inventory certified by him with the defendant, if he can be found in the county. If not so found, it may be left at the last place of residence of the defendant; but if he have no place of residence in the county where the goods and chattels are attached, such copy and inventory are to be left with the person in whose possession the goods and chattels are found.³

Form of Bond to Prevent the Removal of Goods Attached.

Know all men by these presents, that we, John Doe and Richard Roe, of the town of Whitestown, in the county of Oneida, are held and firmly bound unto _____, in the sum of [double the sum stated in the attachment,] to be paid to said _____. Sealed with our seals, and dated the first day of August, 18 ____.

The condition of this obligation is such, that if certain goods and chattels, to wit: [here enumerate them,] which have been seized by the above named _____, by virtue of

¹ 18 Barb. 574; 15 Id. 47.

² 14 John. 434.

³ Sess. Laws 1831, 404, sec. 37.

an attachment issued by _____, Esq., in favor of John Jones, against the above bounden John Doe, shall be produced to satisfy any execution that may be issued upon any judgment which shall be obtained by the plaintiff upon the said attachments, within six months after the date hereof, then this obligation to be void—otherwise of force.

Sealed and delivered }	JOHN DOE,	[L. S.]
in presence of }	RICHARD ROE,	[L. S.]

The surety in this bond is to be approved by the constable, by an endorsement thereon as follows :

“I approve of Richard Roe as surety in the within bond.
Const.”

Form of Bond by Claimant of Property Attached.

Know all men by these presents, that we, John Smith, James Brown and Joseph Taylor, of the town of _____, in the county of Oneida, are held and firmly bound unto John Jones in the sum of _____ dollars, (double the value of the property attached,) to be paid to the said John Jones. Sealed with our seals, and dated the first day of August, 18 .

Whereas, certain goods, to wit : [here state the articles,] were on the first day of August, 18 , seized by _____, constable, by virtue of an attachment issued by a Justice of the Peace of the said county of Oneida, in favor of the above named John Jones against Richard Roe ; and whereas the above bounden John Smith, claims the said goods as his property :—Now, therefore, the condition of this obligation is such, that if in a suit to be brought on this obligation within three months from the date hereof, the said John Smith shall establish that he was the owner of the said goods at the time of the said seizure, and in case of his failure to do so, if the said John Smith shall pay the value of said goods and chattels, with interest, then this obligation to be void—otherwise of force.

Sealed and delivered }	JOHN SMITH,	[L. S.]
in presence of }	JAMES BROWN,	[L. S.]
	JOSEPH TAYLOR,	[L. S.]
	JOHN DOE.	

The approval of this bond is to be either by the constable or the Justice.

It may be in the same form as the next preceding one.

Notwithstanding the provision of the statute, authorizing a bond to prevent the removal of goods attached, the constable may, if no such bond be tendered, take a receipt for the future delivery of the goods, in the same manner as under a levy by virtue of an execution.

When a receipt is taken, the property is still *in the custody of the constable*, and he is responsible for it, in like manner, and to the same extent, as though he had it in his actual possession.¹

The property is protected against other attachments, executions, &c., whether it be removed by the constable, or left with a receptor, or with the defendant, upon taking a bond as security for its future delivery.²

The copy of inventory, to be returned with the attachment, should be in something like the following form :

“Copy of an inventory of property this day seized by me in virtue of the annexed attachment, to wit :

One feather bed,	One axe,
One coverlet,	One spade,
One bureau,	One pitchfork, &c.

August 1, 18 .

Const.”

This copy of the attachment and inventory should not be left at a storehouse, or store, or the like, where the defendant has just stopped on his travels, &c. It should be left at his usual residence or place of abode.³

Having executed the attachment as above provided, the constable is to make a return of the attachment, at the day therein named for that purpose, with all its proceedings thereon, subscribed by him, &c. And in addition to this, he must state specifically whether the attachment was or was not personally served upon the defendant.

Form of Return on Attachment.

“By virtue of the within attachment, I did, on the first

¹ 12 Wend. 563, Nelson J. ; 20 Wend. 238. ² 10 John. 131; 12 Wend. 563; Id. 565; 20 Wend. 238.

³ 15 John. 197.

day of August, 18 , attach, and take into my custody, the goods and chattels of the defendant, mentioned in the annexed inventory, and immediately, on the same day, I made an inventory of the property seized, and served a copy of the within attachment, and of the said inventory, duly certified by me, on the defendant personally.

Dated August 1, 18 . Const."

If a copy of the attachment be not personally served, the following should be substituted, in place of the latter clause or the foregoing form :

"And immediately on the same day, I made an inventory of the property seized, and because the defendant could not be found in the said county of Oneida, I left a copy of the within attachment and of the said inventory, duly certified by me, at the last place of residence of the said defendant, (or, if the defendant have no place of residence,) with John Brown, in whose possession I found the said goods and chattels, the said defendant having no place of residence in the county of Oneida.

August 1, 18 . Const."

If the defendant, or claimant give a bond as above provided, then the constable should add to his return the following :

"But the said goods and chattels were delivered up to Richard Roe, the defendant, (or John Smith,) upon receiving the bond herewith returned. Const."

If the service of copy, attachment and inventory was personal on the defendant, then the Justice can go on and hear the cause on the return day thereof.

But in case the service was by leaving them at the last place of residence of the defendant, or in any other manner than a personal service, and the attachment was issued under any of the provisions of the non-imprisonment act, a summons is to be issued, upon the return of which, personally served, or that after diligent inquiry, the defendant cannot be found, the Justice is to proceed and hear the cause.¹

The statute prescribes no form for this summons, neither does it direct what time may intervene between the date and

¹ Sess. Laws 1831, 404, sec. 38.

return ; and the Supreme Court have not as yet, to my knowledge, passed upon that question.

In the absence of any provision or decision on the subject, the ordinary form of a summons should be used ; that is, if a *long attachment*, use a long summons ; if a short attachment, use a short summons, and have it served in the same manner as in other cases.

In case the defendant cannot be found in the county, after diligent search, the constable should make return of the fact on the summons, to the Justice, who is then authorized to hear the cause on the return day of said summons.

The constable's return on the summons may be in the following form :

"I hereby certify that I have made diligent search, and the within defendant cannot be found in the county, upon whom I can serve the within summons. Dated August 5, 18 . Const."

A constable to whom process is delivered, must execute the same in person, and cannot act by deputy in any case. He may, however, command as many male inhabitants of his county to assist him, as he may think proper, when he is *resisted* in the execution of process, or has reason to apprehend such resistance.¹

A Justice may, on the request of a party, empower any person, being of lawful age, and not a party in interest in the suit, to execute any process in a civil suit, except a venire, which he may issue.²

The return of the constable indorsed by his direction, and in his presence upon the summons by the Justice who issued it, is sufficient evidence of its service to support the jurisdiction of the Justice.³

The authority must be in writing, and endorsed on the process.

The person thus empowered will possess all the powers, and be subject to all the obligations of a constable, in relation to the execution of process, but can receive no fee or reward for his services.⁴

¹ 2 R. S. 199, sec. 273.

² Id. sec. 271.

³ 20 N. Y. 298, and cases cited.

⁴ 2 R. S. 199, sec. 272.

Form.

At the request of the plaintiff, I hereby empower William Brown to execute the within process. Dated August 1, 18 .

W. H. PRATT, Justice.

A person deputized by a Justice of the Peace to serve a summons, must execute it in the same manner as the statute requires a constable to execute such process.

He must therefore serve the summons and make the return *in writing*, in the same manner as a constable, in order to confer jurisdiction upon a Justice. The summons must be returned to the Justice with a *written return* thereon by the officer making the service, to confer jurisdiction upon the Justice to proceed in the action.¹

Where an execution is delivered to a constable for service, it is an entire thing ; and after it is commenced by one constable, it cannot be continued and completed by another.²

If a constable execute a process in an unreasonable and oppressive manner, and with the avowed and malicious design to vex and oppress the party, an action will lie against him.³

A constable must act within his territorial jurisdiction, which is the county where he is chosen, or he will be a trespasser.

In order to execute civil process, an officer may break open a store, warehouse or barn not annexed to a dwelling house, nor forming any part of it. (16 Johns. Rep. 287.)

It is not lawful to break open the outer door or window of a dwelling house to execute civil process ; but if the officer find the outer door open, or it be opened to him from within, and he enters peaceably, he may break open an inner door to execute the process, after having demanded admission and stated his object, and admission has been refused. (2 Selwyn's Nisi Prius, 1247 ; 5 Johns. R. 352 ; 17 Johns. R. 127.)

But a man's house is a protection only to himself and his family, and will not protect any other person who flies to it,

¹ Jackson vs. Sherwood, 50 Barb. ² 7 Wend. 220. (So of a Sheriff.)
356 ; 24 Barb. 423 ; 20 N. Y. 298. ³ Rogers vs. Brewster, 5 John. 125.

and an outer door may, in such cases, be broken open to arrest the fugitive, after a request to open the door, and a refusal.

The above rules as to the execution of civil process, would seem to be applicable to all processes issued by a Justice under the Justices' Act, as a summons, warrant, attachment and execution. Thus, if a constable has a summons and the defendant shuts himself up in his house and refuses admittance to the constable, he cannot break the outer door in order to make the service, and in such case it would seem no service could be made. A service by reading the summons at the door would hardly be sufficient. Such a concealment of the defendant would be a sufficient ground for an attachment, and is one of the grounds particularly mentioned in 2 Rev. Stat. 230, § 26.

Civil process cannot, by statute, be executed on Sunday, and a service of such process on Sunday is utterly void, and subjects the officer to damages. (1 Rev. Stat. 675, § 69.) But if a person arrested on civil process, escape from the officer, he may be retaken on Sunday, and in such case the officer may break open an outer door in order to retake him after a demand and refusal. (7 Johns. Rep. 155-6.)

It is provided by statute that no court shall be opened or transact any business on Sunday, unless it be for the purpose of receiving a verdict or discharging a jury.¹ This prohibits the issuing of any process upon that day, and would render any process so issued void. It is also provided that no writ, process, warrant, order, judgment or decree, or other proceeding of any court, or officer of justice shall be served or executed upon the first day of the week called Sunday, (except criminal cases, or where the service is specially authorized by law,) and that the service of any such process or proceeding shall be utterly void, and subject the party offending to damages at the suit of any person aggrieved.² A similar provision prohibiting the service of process on Saturday, or of process returnable on Saturday upon persons observing that day as the Sabbath, has been

¹ 2 R. S. 275, sec. 7. [4th ed. p. 464, ² 9 John. 130.
sec. 15.] 12 John. 178.

already referred to.¹ If, however, a judgment is rendered on Saturday against such person it is not void.²

The time which is included in the prohibition is understood to be a natural day, commencing at midnight and continuing to the next midnight. In Connecticut, under a similar provision, the courts have held that the term *Sunday* or *Lord's day* included only the solar day.

A Justice of the Peace is authorized to amend the date and return of a summons after it has been served.³

A Justice of the Peace has authority to allow a constable to amend his return to a summons. And the refusal of the defendant to appear will not deprive the Justice of this right. The power of amendment does not depend upon the appearance of the defendant in the suit.⁴

And where a summons issued on the third day of January, 1846, and made returnable on the *tenth day of January instant*, was by mistake dated January 3d, 1845, and having been personally served on the day it was issued, the plaintiff obtained judgment without an appearance on the part of the defendant. *Held*, that the defect having been overlooked by the Justice, should be disregarded by the Common Pleas and by this Court.⁵

The delivery of process to the constable is no part of the official duty of a Justice of the Peace, and although the Justice stated in his return to a certiorari that the summons was delivered to the constable the same day it was dated to be served, such statement cannot be regarded by this court as evidence of the fact; some third person should have been called and proved the fact.⁶

Where a summons in a Justices' Court is returned as having been served by copy, and the Justice issues another summons, the suit is legally continued, and in respect to the defence of the statute of limitations is deemed to have been commenced when the first summons was delivered to the constable for service.⁷

¹ 2 R. S. p. 275, secs. 8, 9. [4th ed. p. 464, secs. 16, 17.]

² 2 R. S. 267, sec. 233. [4th ed. p. 453, sec. 154.]

³ 4 Denio, 498, Jewett J.

⁴ 22 Barb. 137.

⁵ 4 Denio, 498, Jewett J.

⁶ 3 Denio, 12, Jewett J.

⁷ Id.

A Justice of the Peace has no power to compel the substitution of new parties in a suit before him, the provision in 2 R. S. 474, § 100, not being applicable to Justices' Courts. If new parties voluntarily consent, they may be substituted by the Justice.¹

Where new trustees do not apply to be substituted, the suit against the old ones should proceed, and if a recovery is had, they are entitled to be allowed the amount in their official accounts.

Where a short summons has been issued by a Justice in behalf of a non-resident, without the necessary security having been given, the Justice should non-suit the plaintiff the moment that fact is made known to him.²

A person having no legal residence any where, it seems, may be sued by long summons. That process is appropriate unless the defendant is a *non-resident* of the county.³

¹ Colgrove vs. Breed. 2 Denio, 125,
Beardsley J.; 11 How. Pr. 140.

² 9 Barbour, 60.
³ 4 Comstock, 364.

CHAPTER IV.

Of Appearance of the Parties.

In relation to the appearance of the parties in a Justices' Court, the provisions are embraced in the Code of Procedure, and will be found by reference to the sections cited in the margin.

Any plaintiff in a suit before a Justice, except persons under twenty-one years of age, may appear and conduct his suit, *either in person or by attorney*.¹

No process shall be issued for an infant plaintiff, nor shall any issue joined by such plaintiff without process, be heard, until a next friend for such plaintiff shall have been appointed. Whenever requested, the Justice shall appoint some suitable person, who will consent thereto in writing, to be named by such plaintiff, to act as his next friend in such suit who shall be responsible for the costs therein.²

This appointment of a *next friend* must be made before process is issued, or where *issue is joined* without process, before the issue is heard.

The Justice may appoint any suitable person the infant may name.

It is proper to remark, that this statute applies to all process issued by a Justice, by which a suit is commenced.

When an infant is a party, he must appear by guardian, who may be appointed by the court in which the action is prosecuted, or by a Judge thereof, or a County Judge.³

The guardian shall be appointed as follows :

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years, or if under that age, upon the application of his general or testamentary guardian, if he has any, or of a relative or friend of the infant. If made by a relative or friend of the infant, notice thereof must first be given to such guardian, if he has one ;

¹ 2 R. S. 164, § 39.

³ Code, § 115.

² Id. § 40.

if he has none, then to the person with whom such infant resides.¹

2. When the infant is the defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within twenty days after the service of the summons. If he be under the age of fourteen, or neglect so to apply, then upon the application of any other party to the action, or of a relative or friend of the infant, after notice of such application being first given to the general or testamentary guardian of such infant, if he has one within this State ; if he has none, then to the infant himself if over fourteen years of age, and within the State, or if under that age, and within the State, to the person with whom such infant resides.

By the 115th section of the Code, when an infant is a party, he must appear by guardian instead of a next friend as heretofore, who may be appointed by the court in which the action is commenced ; and if he be fourteen years of age or over, the appointment must be made upon his petition, if under fourteen years of age, upon the petition of some other party to the suit, or of some relative or friend of the infant.

The petition may be in the following form :

Form of Petition for Guardian.

To D. GILLMORE, Esq., Justice of the Peace :

The petition of A. B., who is an infant of the age of _____ years, respectfully sheweth that he is about to commence a suit before you against C. D., for [here state the subject matter,] and prays that E. F. may be appointed his guardian in said suit.

A. B.

Dated April 30, 18 ____ .

If any other person than the infant signs the petition, then say: The petition of O. S., a relative or *friend*, as the case may be.

I suppose the Justice may insist on a clause being inserted in the consent, that the next friend *will pay the costs*.²

“ ONEIDA COUNTY, ss.—I hereby consent to be the guar-

¹ Code, § 115.

² 2 R.S. 164, § 40, Doe vs. Alton; 1 T. R. 491, Buller J.

dian of A. B., an infant, in a suit against C. D., and hereby, for value received, promise and agree with the said C. D. to pay him such costs as he shall recover against the said A. B. by judgment in the said suit.

August 1, 18 . JOHN BROWN, Guardian.

I hereby appoint the said J. B. as a guardian for the said A. B., an infant plaintiff, (or defendant, as the case may be.)

D. GILLMORE, Justice of the Peace.

Utica, July 30, 18 .

Where costs are adjudged against an infant plaintiff, the guardian by whom he appeared in the action shall be responsible therefor, and payment thereof may be enforced by attachment.¹

Under the above section, although the guardian for the plaintiff is liable for costs, a Justice of the Peace has no power to *issue* an attachment for the costs, but the same may be recovered of the *guardian* by action against him for the amount.

After service and return of process against an infant defendant, the suit shall not be any further prosecuted, until a guardian for such defendant shall be appointed. Upon the request of such defendant, the Justice shall appoint some person who will consent thereto in writing, to be the guardian of the defendant in the defence of the suit. And if the defendant shall not appear on the return day of such process, or if he neglect or refuse to nominate such guardian, the Justice may, on the motion of the plaintiff, appoint any discreet person as such guardian.²

The consent of such next friend or guardian shall be filed with the Justice. The guardian for the defendant shall not be liable for any costs in the suit.³

If the defendant select a guardian, he appears before the Justice on the return day of the process, mentions his choice to the Justice, and his nominee is then to sign an agreement in the following form :

¹ Code, sec. 316.

³ Id. sec. 43.

² 2 R. S. 164, sec. 42.

Form of Consent to be Guardian for an Infant Defendant.

In Justices' Court, before D. Gillmore, Justice :

A. B. }
 agt }
 C. D. }

I hereby consent to be the guardian of C. D., the defendant in this action, who is under the age of twenty-one years.

August 1, 18 .

J. B.

I hereby appoint the said J. B. guardian for C. D. in the above action.

D. GILLMORE, Justice.

August 1, 18 .

The next friend or guardian is not authorized to release a witness in order to render him competent.¹

An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute may sue, without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another.²

Under the 114th section of the Code, as it stood formerly, it was in many cases difficult to determine when the husband of a married woman should be joined with her in an action affecting her separate estate ; but the Legislature, at its recent session, have amended the section so as to leave no doubt in what cases the husband should be joined with her.³

As amended, it reads as follows :

§ 2. Section one hundred and fourteen of the Code of Procedure is hereby amended so as to read as follows :

§ 114. When a married woman is a party her husband must be joined with her, except that—

1. When the action concerns her separate property, she may sue alone.

2. When the action is between herself and her husband, she may sue or be sued alone, and in no case need she prosecute or defend by a guardian or next friend.

¹ 2 Starkie R. p. 41.

³ Sess. Laws 1857.

² Code, sec. 118; 2 Sandford, 706.

It seems (from the foregoing section as amended) to be necessary in all cases to join the husband in all actions affecting the wife, except in actions relating to her separate estate, in which case she may sue *in her own name*.

A next friend is not necessary when the infant wife is not sole plaintiff.¹

In *Willis vs. Underhill*, (6 How. 396,) it was held that the plaintiff, although married, was competent to take a gift or assignment of a debt, as well as of any other personal property, and to hold the same, to her sole and separate use, &c., in like manner and with the like effect as if she were unmarried.

That as the action concerned her separate property, she was not bound to join her husband, but by the express terms of the Code, (§ 114,) was authorized, at her option to sue alone.

A party authorized to appear by attorney, may appoint any person to act as such attorney; but the constable who served either the original or jury process in the case, shall not appear and advocate for either party at the trial, but may act as attorney in any other stage or proceeding in the cause.²

A constable appearing on the trial of a cause as the attorney of a plaintiff, and proving the demand declared on, is a violation of the statute prohibiting a constable from appearing and advocating for either party at the trial, although at the time there was no appearance by the defendant, nor any one in his behalf.³

The authority to appear by attorney may be either written or verbal, and shall, in all cases be proved, either by the attorney himself or other competent testimony, unless admitted by the opposite party; and the Justice shall not permit any person to appear for another without such proof or admission.⁴

Upon the return of a summons personally served, or on

¹ *Hulbert and wife vs. Newell*, 4 ³ *Ford vs. Smith*, 11 Wend. 74; 2
Howard, 98; 6 How. 223. John. 385; 9 John. 352.

² 2 R. S. 164, sec. 44.

⁴ Id. sec. 45; 2 Cow. 421; 14 John.
369.

the return of an attachment duly served, the Justice shall wait one hour after the time specified for the return of such process, unless the parties sooner appear.¹

If the plaintiff fail to appear within the hour thus limited, either personally or by some one in his behalf, the Justice is required to enter judgment of non-suit against him.²

A defendant in a Justices' Court is entitled to judgment of non-suit if the plaintiff do not appear within one hour after the time for appearance mentioned in the summons, and where the Justice required him to wait *five minutes longer*, which he refused to do, and the plaintiff appeared within that time, and after the defendant had left, and the Justice proceeded with the cause, *held* erroneous. If the plaintiff had appeared before the defendant *had gone away*, though after the hour, or if he were in sight and approaching, or if the Justice were engaged in other official business during the hour, it would have been regular to proceed in the cause after the hour had expired.³

It may be remarked that no precise rule can be laid down as to the sufficiency of the reason which may be urged for delaying to call the cause beyond the hour given by statute, or for permitting the defendant to come in and plead after the cause is called, or the trial has commenced. Cases will and do arise, presenting circumstances so various as to preclude the possibility of establishing a uniform regulation by which Justices should be governed. Each case will have its own peculiarities, and the magistrate should endeavor to consult the convenience of parties, at the same time that he avoids doing anything which may tend to the prejudice of either.

Where the action is commenced by warrant, the plaintiff should either be ready at some place where the constable may find him to notify him of the arrest of the defendant, or have an attorney employed to appear for him. As the defendant cannot be detained in custody for more than twelve hours after he is brought before the Justice, the plaintiff

¹ 2 R. S. 164, sec. 46; 20 John. 309. ³ Wilcox vs. Clement, 4 Denio, 160

² 2 R. S. 179, sec. 119.

Bronson Ch. J.; 15 John. 496; 11 Wend. 51.

should be prepared to try the cause immediately upon notice of the arrest, or within an hour or two. He should have his witnesses ready to appear at once. If he does not appear either in person or by attorney within a reasonable time, the Justice should discharge the defendant.

What is a reasonable time must be determined by the facts of each particular case. It will depend upon a variety of qualifying circumstances ; as whether the arrest and notice thereof be in the day or night time, whether the plaintiff's witnesses be at hand or several miles off, &c., &c.; and the Justice must necessarily, in these cases, possess a large and liberal discretion. The warrant in general, presupposes an intention in the defendant to escape, or danger of the plaintiff's losing his demand in some other way, and its object would be entirely defeated, in many instances, by denying a reasonable time for the plaintiff to procure proof to maintain his action. On the other hand, the defendant ought not to be oppressed by one moment's unnecessary delay by the plaintiff.

If, after an adjournment, he fail to appear within one hour after the time to which the adjournment shall have been made, the Justice must render judgment of non-suit against him.¹

The authority to appear by attorney in Justices' Courts, *when not admitted by the opposite party*, must in all cases be proved either by the attorney himself or by other competent testimony. A Justice cannot act upon information which he has received out of court in relation to the appointment of an attorney, even though the information come from the party for whom the attorney appears.²

On the return of a summons before a Justice, A., as attorney for the plaintiff, but without having proved his authority as such, declared upon a note payable to the latter, which he produced. There was no appearance on the part of the defendant, and the cause immediately proceeded. A., being sworn generally in the cause, testified, among other things,

¹ 11 Wend. 51.

² 2 Cow. 429; 5 Hill, 428; 1 Id. 501.

that the note was left with him for collection. *Held*, sufficient.¹

A general authority *to collect, implies* an authority thus to appear.²

It appears from the statute and the cases cited, that in case there is no appearance on the part of the defendant, and any person appearing as attorney for the plaintiff, he must *prove* his *authority*, either at the commencement of, or on the trial, so to appear.

When a summons is issued by a Justice of the Peace against several defendants, a valid service upon one, and a proper return of the service by the constable, is sufficient to authorize the Justice to proceed and render judgment in form against all the defendants.

The requirements of the statute are complied with by a return showing proper service upon one defendant, without negative additions explaining how the summons was served upon the others.³

It is irregular for the same person to appear as attorney for both parties on the return of a summons.⁴

Notwithstanding the defendant in a suit before a Justice of the Peace fails to appear at the trial, the plaintiff must establish his cause of action by legal evidence.⁵

¹ *M'Minn vs. Rightmyer*, 3 Hill, 286, ⁴ 15 Barb. 650.

Cowen J.

⁵ *Perkins vs. Stebbins*, 29 Barb. 523;

² *Id.*; 19 Barb. 344.

44 Barb. 120.

³ 13 Barb. 246,

CHAPTER V.

OF THE PLEADINGS.

By the Plaintiff.

The Revised Statutes as amended provide, that "At the time of the first appearance of the parties before the Justice, either upon the return of process, or their voluntary appearance to join issue, the pleadings of the parties shall be made and issue joined; and when both parties have appeared on the return of process, an issue shall be joined before any adjournment shall be had, except when the defendant shall refuse or neglect to plead."

By *pleading* is not meant the arguing or advocating the cause before the Court, but the *allegations* of the parties briefly setting forth the cause of action on the part of the plaintiff and the defence on the part of the defendant. In Courts of Record under the former system of pleading these were required to conform to a variety of artificial rules, which rendered it necessary to prepare them with great care and skill. In Justices' Courts less strictness is required, but still it is necessary to observe the general rules, if objections are made to any want of form or substance in the pleading.

Complaint.

The first step to be taken in pleading before the Justice is the complaint of the plaintiff, which is a statement on his part, either in writing or oral, in a plain and direct manner, the facts constituting his cause of action; and he may *unite in one suit* several causes of action.

It is now provided by the Code of Procedure that the following rules shall be observed in the Courts of Justices of the Peace:

- I. The pleadings of these Courts are—
 1. The complaint by the plaintiff.
 2. The answer by the defendant.

II. The pleadings may be oral or in writing—if oral, the substance of them shall be entered by the Justice in his docket; if in writing, they shall be filed by him, and a reference to them shall be made in the docket.

III. The complaint shall state, in a plain and direct manner, the facts constituting the cause of action.

The complaint should set forth a cause of action against the same parties who are named as defendants in the process. If issued against a defendant under a fictitious name, as soon as his true name is discovered, the proceedings should be amended so as to make them conform to the fact. So if a defendant be brought into Court under a mistaken christian or surname, the plaintiff should have the proceedings amended by the insertion of his true name in them. This the Justice has power to do. The Revised Statutes provided generally that all courts should have power to amend their process, pleadings or proceedings, in form or substance, for the furtherance of justice, at any time before judgment, and gave to Justices' Courts all the necessary powers which are possessed by Courts of Record in cases where no special provision was *otherwise made by law*. The eleventh subdivision of section sixty-four of the Code of Procedure has provided for amendments of the pleadings at any time during the trial, or upon appeal, when by the amendment, substantial justice will be promoted, and gives a justice power to require the payment of costs as a condition of the amendment in cases where it may be proper.

Where the complaint is against partners it should appear who are intended. Thus, if the defendants make a promise as the firm of A. B. & Co., it should be alleged that they are partners, and under such firm name made the promise. The provisions of the Code permit this to be done in any form, which will be such as to enable a person of ordinary understanding to know what is intended.

The damages claimed in the complaint should not exceed two hundred dollars, for the Justice has no jurisdiction of an action where more than that sum is claimed. A claim of a gross sum, as two hundred dollars, is (see amendment) sufficient, where the damages are such as naturally arise

from the facts. There are cases, however, where the plaintiff has sustained other damages than such as naturally arise from the defendant's failure to perform his contract or from a wrong which he has committed.

Where time and place are mere matters of form, they need not be stated in the complaint, as no advantage can be taken of their omission. If, however, time and place are material, as they sometimes are, it is not only necessary to *state them*, but to state them truly. Thus, if the party complain of the breach of a special contract, he must state it as accurately as possible; but it is presumed he would be allowed to amend if he had by mistake stated it wrong, by giving a wrong date, or in any other particular which formed a *material* part of the contract.

In the statement of a contract, however, if in writing, it is advisable to produce it and state the breaches; if it rests in parol, to state its substance, and if any material variance is shown on the trial, it can be corrected by amendment, upon such terms as shall appear just to the Court.

The complaint need not correspond with the summons in every respect. Thus, where the summons described the action as a civil action for damage, and false representation in the sale of a horse, and the complaint was for a breach of warranty in the sale of a horse, the Court said, the complaint was in a civil action, and that was enough. (*Delaney vs. Nagle*, 16 Barb. 97.)

A complaint on a sealed instrument need not state the sealing, it is sufficient if the instrument is referred to. (*Smith vs. Kerr*, 3 Cow. 144.)

Any mode which apprises the defendant of what is intended, is sufficient. (*Hall vs. McKechnie*, 22 Barb. 244.)

The following forms will indicate to the party how to proceed before the Justice in pleading :

IN JUSTICES' COURT—Before		Esq., Justice.
JOHN BOYD	}	
<i>agt</i>		
RICHARD ROW.		

The plaintiff complains that the defendant is indebted to him for one cow he sold him about the month of last, for

twenty-five dollars. He claims damages to twenty-five dollars.

OR—the plaintiff complains that the defendant is indebted to him for one horse, which he sold and delivered to him about the day of , 18 , for fifty dollars. He claims damage to fifty dollars and interest on the same.

OR—the plaintiff complains that the defendant owes him the amount of the annexed account. [Here deliver it to the Court.] He claims damages to said amount.

OR—the plaintiff complains of defendant for that on or about the day of , the defendant took and carried away one wagon [or as the case may be,] belonging to plaintiff, to his damage of seventy-five dollars.

OR—the plaintiff complains of defendant for wrongfully entering upon the premises of the plaintiff, situate at , and cutting his grass [or as may be] to his damage of fifty dollars.

The foregoing forms are sufficient to show the form and substance of a complaint, and it is here to be observed that no particular form need be used, only to state to the Court the facts as near as may be.

The pleadings may be either verbal or written, at the discretion of the party making the same, except in the case of a plea of title to land. When written, they shall be filed and remain with the Justice; *when verbal*, the Justice shall enter in his docket the substance thereof.¹

The pleadings in a Justices' Court should be liberally construed without regard to established forms, or to technical rules of pleading, and with a view to substantial justice between the parties; that is, it shall be sufficient, if they answer the substantial purposes of pleading, and apprise the opposite party of the real grounds of action or defence, so that there shall be no surprise or misapprehension as to what each party is to meet in evidence.²

Where a plaintiff in a suit before a Justice, declares both on contract and in tort, and no objection is taken to the

¹ 2 R. S. 233, sec. 47; [4th ed. p. 2 18 Wend. 67, Savage Ch. J.; 22 484.] Wend. 869.

misjoinder, he may be permitted to recover in either form of action, on making a proper case by proof.¹

If the declaration in a Justices' Court do not set forth a cause of action, the defendant should have judgment, though he took issue instead of demurring, and the facts were fully proved.²

Accordingly, where the plaintiff declared that the defendant or *his family*, set his dog upon the plaintiff's swine, and upon the general issue pleaded that the defendant's daughter, in his absence, set the dog upon plaintiff's hog, which was killed, and judgment was given for the plaintiff. *Held*, erroneous, and the judgment was reversed.³

Held, also, that the circumstance, that the defendant had moved for a non-suit upon grounds which could not be sustained, overlooking the real objection, afforded no ground for sustaining the judgment.⁴

Defects, both in substance and form, in the pleadings in a Justices' Court, are overlooked where a good cause of action is proved, and the merits have been fairly tried.⁵

But if any material part of the plaintiff's case is wholly unsupported by evidence, a judgment in his favor will be reversed, whether the trial was with or without a jury.⁶

In a Justices' Court the plaintiff's declaration in writing, stated the defendant on, &c., at, &c., with force and arms, seized, took and carried away certain personal property of the value of one hundred dollars. There was no allegation that the goods were the property of the plaintiff. *The defendant did not appear.*⁷

The plaintiff proved the taking, and that the property was his. *Held*, that the declaration was sufficient to uphold the judgment. Justice Bronson says: although the complaint would be bad on *objection* for not alleging that the plaintiff *owned* the property, it was quite as formal as plead-

¹ Willard vs. Bridge, 4 Barb. 341, Allen J.; 14 John. 383; 1 Hill, 61; 10 Wend. 254; 22 Id. 369.

² Tift vs. Tifts, 4 Denio, 175; Id. 125.

³ Id.

⁴ Id.

⁵ Id., Bronson Ch. J.; Ely vs. Van Beuren, 3 Caine's R. 218; 1 John. R. 276; 9 John. R. 386.

⁶ 4 Hill, 179; 1 John. 339; 2 Hill, 125; 18 Wend. 141; 6 Wend. 326.

⁷ 2 Comstock, 115, in Court of Appeals.

ings usually are in Justices' Courts ; and as no objection was made before the Justice, and the plaintiff proved a good cause of action of the kind mentioned in his complaint, it was regular ; that it was not important the defendant did not appear.

There is no particular mode by which counts or causes of action are to be separated and distinguished from each other in a complaint in a Justices' Court. Any mode which apprises the defendant of what is intended is sufficient.

Where a complaint in a Justices' Court purported to contain four several causes of actions separately, it being averred in the first count that the defendant was indebted to the plaintiffs as Overseers of the Poor in the sum of twenty-five dollars, whereby an action had accrued to them, according to the statute, specifying the section, &c., which section imposed a penalty of twenty-five dollars for selling strong and spirituous liquors or wines in small quantities without a license, to be recovered in an action in the name of the Overseers of the Poor, and each of the subsequent counts stated a further cause, in form similar to the first.

Held, that the complaint was sufficient in substance ; and it being proved that the defendants were proprietors of a store, doing business together, and present in the store daily, that sales by small measure of spirituous liquors were made there by a clerk of the defendants, some of which occurred in their presence.

Held, that this proof warranted the conclusion that the sales were made by their authority, and that they thereby incurred the penalty in like manner as if they had sold personally.

Held further, that the penalty for each offence was single, and that the defendants having united in committing the offences, were jointly liable for the penalty incurred.

If a defendant in a Justices' Court designs to raise the objection that the complaint is not sufficiently explicit, or that it does not contain a cause of action, he should raise them by demurrer. The objection of indefiniteness and uncertainty will be waived by not thus making it. And so

it seems in respect to the objection that a cause of action is not stated.

Where the parties go to trial upon a complaint however defective, without objection on account of the defects, if the plaintiff proves a good cause of action, a judgment in his favor will be good.¹

If a complaint in a Justices' Court is insufficient, the defendant should demur to it. If he takes issue upon it he cannot upon appeal object to it in point of form.²

If a defendant join issue on the merits after demurrer is overruled he thereby waives the demurrer.³

It is not necessary that the complaint in a Justices' Court should correspond with the summons in respect to the cause of action.

A Justice of the Peace has the power, and may amend a complaint at any time before trial, by substituting one form of action for another. This power, under the former as well as the present system, has been possessed in common with other courts for a long time.⁴

The particular plea need not be stated in the summons.

If the complaint is in a civil action it is enough.⁵

¹ 22 Barb. 244; 18 Barb. 494.

² 12 Barb. 466.

³ 10 How. Pr. 276.

⁴ Bigelow vs. Dunn, 36 How. 120
and cases cited.

⁵ 16 Barb. 96.

CHAPTER VI.

Proceedings where the Justice is a Material Witness.

It occasionally happens that a defendant desires the testimony of the Justice before whom the action is pending, and it is to be observed that—

A Justice can never be a witness in his own court, neither can he act upon facts within his own knowledge as evidence in the cause. Whenever, therefore, the defendant wishes to avail himself of the testimony of the Justice, a course of proceeding is pointed out by the statute for that purpose; and if he make out a proper case, in the opinion of the Justice, a judgment of discontinuance should be entered, as directed in the section of the statute cited below. It should be remarked that the provisions of the statute apply only to the defendant. If the plaintiff require the testimony of the Justice, it is his own fault if he commence his suit before him; he should have proceeded before another Justice. The provision of the statute is in these words:

“If, previous to joining issue in any cause, (except where the defendant shall have been arrested by warrant,) the defendant shall make affidavit that the Justice before whom the same is pending, is a material witness for such defendant, without whose testimony he cannot safely proceed to trial, and shall set forth therein the particular facts and circumstances which he expects to prove by the Justice, judgment of discontinuance shall be entered, if the Justice shall be satisfied that he is a material witness for the defendant, and that without his testimony the defendant cannot safely proceed to trial, and not otherwise, but without costs against either party.”¹

The affidavit is to be made previous to the joining of issue, that is before the defendant answers the complaint. In strictness the defendant cannot, until the complaint is made, know what the plaintiff has brought his action for.

¹ Laws 1838. Ch. 243. [4th ed. R. S. vol. 2, p. 444, sec. 109.]

Form of Affidavit that Justice is a Material Witness.

IN JUSTICES' COURT—Before _____, Justice.

STEPHEN STOW }
 vs. }
 JAMES RANSFORD. }

ONEIDA COUNTY, SS.— _____, defendant in the above entitled cause, being duly sworn, says that _____ Esq., the Justice of the Peace before whom this cause is pending, is a material witness for this deponent in the said cause, and that he cannot safely proceed to the trial thereof without the testimony of the said Justice. And this deponent further says, that he expects to prove by the said Justice, the following facts and circumstances, to wit: [here state the facts and circumstances which he expects to establish by the testimony of said Justice.] And this deponent further says that he is not able, to his knowledge or belief, to prove said facts and circumstances above mentioned, by any other person than the said Justice.

Sworn before me, this first }
 day of May, 18 ____ . }

Justice.

The affidavit must contain "the particular facts and circumstances which he expects to prove by the Justice," so as to enable the Justice to determine therefrom whether he is a material and necessary witness. These facts and circumstances will of course vary with each particular case. They should be stated with accuracy, particularity and precision. If the Justice should improperly refuse upon the affidavit to enter a judgment of discontinuance, his error would be a good ground for the reversal of his judgment upon appeal. And the fact that after he refused to enter such judgment of discontinuance, the defendant answered the complaint and went to trial, would not waive the error.

If the Justice enters a judgment of discontinuance, he should make an entry of the facts in his docket, as follows:

"May 1, 1857, the parties appear. Plaintiff makes his complaint as follows, &c.: The defendant makes an affidavit of my materiality as a witness according to the statute. Being satisfied that I am a material witness as stated in the

affidavit on file, I render judgment of discontinuance without costs to either party."

In this case each party is liable to the Justice for the costs which he has made, but no execution can be issued to enforce their collection.

Upon the presentation of the affidavit to the Justice he should immediately determine *from the facts and circumstances stated in it* whether he is a material witness. He is not permitted to act upon his own knowledge or recollection of them. His duty is as a judge to determine from the affidavit, assuming that it is true, whether the facts which the defendant expects to prove by him are pertinent and material, and such as he can satisfactorily prove by no one else. If they are, he must enter judgment of discontinuance. The case of *Hopkins v. Cabrey*,¹ illustrates the duties of the Justice. Hopkins sued Cabrey, who was a school district collector, for the surplus moneys remaining in his hands on sale of property for a school tax. Cabrey made an affidavit that the Justice was a material witness for him, and stated the facts which he expected to prove by him as follows: "The particular facts which the defendant expects to prove by the Justice, are, that previous to and before the commencement of this suit, the plaintiff sued the defendant before the Justice for the identical property for which he now claims the surplus money, and judgment was passed on the same and entered in favor of this defendant against the said plaintiff for costs. And also, this said defendant expects to prove by the said Justice, that said plaintiff acknowledged in the presence of the said Justice that the defendant had tendered to him (said plaintiff) the overplus money, before the commencement of the former suit; and that he had no claim for overplus moneys. And this defendant does not know of any other person by whom he can prove the declaration last named in this affidavit." Upon this affidavit the Justice ruled as follows: "I am not satisfied that I am or can be a material witness in behalf of the defendant in this cause, for I know nothing material between the said parties, except what is contained in the record of the former

¹ 24 Wend. 284.

trial between these parties before me, which this defendant can at all times avail himself of upon the trial of this cause ; and further, I have no recollection of ever having heard the plaintiff admit that the defendant had tendered him the overplus money, as mentioned in the affidavit." The defendant then pleaded, and upon a trial the Justice gave judgment for the plaintiff. Upon the case coming before the Supreme Court, the following opinion was given by Justice Cowen : "The affidavit was clearly sufficient within the statute. *The Justice had no right to interpose his private knowledge or recollection* as an answer to the affidavit. Such a power would enable a Justice to defeat the application, and at the same time to put the point beyond the reach of review, even on the facts which he may assume to know, or to have forgotten. Here, it is true, he states them, but not under his oath as a witness ; that the defendant has a right to require. Again, his specification was not satisfactory. He had no right to assume that the docket and other written proceedings would have been proof as full to the purpose as if accompanied with his oath. Oral proof is often necessary to show what was in fact heard and submitted under an issue which has been tried, in order to give it the desired effect upon a subsequent trial of the same matter. His want of recollection might also have been remedied by a recurrence to circumstances in the course of his examination as a witness."

Though the defendant in a suit pending before a Justice, make affidavit pursuant to the act of 1838, that the Justice is a material witness, &c., a discontinuance should not be granted, unless the facts and circumstances are such that the Justice can judicially pronounce them relevant.

Accordingly, where the affidavit stated that the defendant expected to prove by the Justice a submission of the demand in controversy to three arbitrators, of whom the Justice was one, that the agreement to submit was made between the defendant and one C., "who then claimed the demand, and that C. afterward revoked the submission before any award was made : " *Held*, not sufficient to warrant a discontinuance, though the affidavit added that the defendant settled the

demand with C., who was either owner thereof or agent for the plaintiff, it not appearing that he expected to prove the latter by the Justice.

The affidavit, moreover, should contain enough to show that the Justice is a *necessary* as well as a material witness, especially when on its face it imports that there are others who know the same matters.

Whether a discontinuance can be properly ordered on an affidavit made before the plaintiff has declared, *quere*.¹

The statute above referred to does not provide for the case of a Justice being a material witness in a suit commenced by warrant. In such case if it be made to appear to the Justice issuing the process, by the affidavit of the defendant, that such Justice is a material witness in the cause, instead of the Justice entering a judgment of discontinuance, the constable is required to take the defendant before the next Justice of the city or town, who shall take cognizance of the cause, and proceed thereon, as if the warrant had been issued by him.²

Demurrer.

By the sixth subdivision of the sixty-fourth section of the Code, either party may demur to a pleading of his adversary, or any part thereof, when it is not sufficiently explicit to enable him to understand it, or it contains no cause of action or defence, although it be taken as true.

7th Subdivision.

If the Court deem the objection well founded it shall order the pleading to be amended, and if the party refuse to amend, the defective pleading shall be disregarded.

This provision of the Code contemplates the right of a party to continue to demur to the pleading of his adversary until he shall state in a plain and direct manner the facts which constitutes his cause of action or defence. Each party has a right to insist that the pleading of his opponent shall conform to this rule.

¹ Young vs. Scott. 3 Hill. 32.

² 2 R. S. 229, sec. 21. [4th ed. p. 480, sec. 19.]

And when the complaint has been made to conform with the requirements of the Code of Procedure, the defendant must answer.

It should be here observed that the Courts do not require any precise form for a pleading. They only require a plain and concise statement of the demand or defence, and every person of common sense can make such a statement when called upon by the Court.

If the defendant desires to raise the question to the Court as to the sufficiency of the complaint by demurrer, he should do so before he makes his answer upon the merits.

So if the plaintiff desires to object to the sufficiency of the defendant's answer, he should do so by a demurrer before he proceeds to trial upon the merits, for then he will be regarded as waiving his right to do so, and the Court should hear the case on the merits.¹

No particular form of words need be used to raise the objection by a demurrer; it is enough to say:

"The defendant demurs to the complaint (or, to the second cause of action) as not explicit enough to enable him to understand it, and as containing no cause of action," (or as the case may be.)

If the defendant demur to the complaint, and the Justice decide that the demurrer is not well taken, and overrule it, the defendant may answer, setting up any defence he may have. If he does not then answer, the Justice will proceed to hear the plaintiff's proofs under the complaint, and give judgment thereon. If the Justice decide that the demurrer is well taken, and the plaintiff refuse to amend his complaint, the Justice must disregard it, and he can of course hear none of the plaintiff's proofs, for the absence of a complaint, and will non-suit the plaintiff. So if the plaintiff demur to the answer, and the Justice decide that the demurrer is not well taken, and overrule it, the cause will be at issue, and the Justice will proceed to hear the proofs of the parties. If, however, he decide that the demurrer is well taken, then, unless the defendant answer anew, the Justice must disregard his answer, and upon the

¹ 12 Barb. 466; 8 Barb. 210; 13 Wend. 403.

plaintiff proving his case, the Justice will give judgment, as the defendant can introduce no proof, for the want of an answer.

Where there is no dispute between the plaintiff and defendant as to the facts, but the question is simply as to the rights of the parties, the facts being conceded, it is called an issue of law. Thus, where a plaintiff complained that the defendant's cow attacked and injured him, and the defendant demurred, for the reason that the complaint contained no cause of action, an issue of law would be formed for the Justice to decide. In such a case, the want of the allegation in the complaint, that the cow had been previously accustomed to attack mankind, and that the defendant had notice thereof, would avoid the cause of action. But if the complaint contained the latter allegation, and the defendant in his answer admitted that the plaintiff received the injury from the cow, but denied that she was accustomed to attack mankind, or that he had knowledge that she was, an issue of fact would be formed. And in all cases where a fact is affirmed by one party, which is denied by the other, the issue is one of fact, and a proper one to be tried.

It is held that where a defendant in a Justices' Court, on the decision of a demurrer against him, puts in an answer, he thereby waives the demurrer, and the Supreme Court on an appeal cannot review the decision of the Justice in overruling the demurrer.¹

In another case, after issue had been joined before a Justice of the Peace, and the parties had met for the trial of the cause, the defendant then insisted that the Justice should decide a motion *which had been previously made*, that the complaint be dismissed on the ground that it did not contain facts enough to constitute a cause of action. The Justice granted the motion without giving the plaintiff the right to amend.

Held, that in this decision the Justice erred. The Court say, (Gridley J.) "the issue in the cause had been joined, and the parties had met for the trial of the cause, on the day to which it stood adjourned. At this stage of the suit

¹ 11 Barb. 587 ; 1 Denio, 222; 10 Howard, 276.

the defendant insisted on having a motion decided which he had previously made. The motion was that the complaint be dismissed on the ground that it did not contain facts enough to constitute a cause of action. The Justice granted the motion without giving the plaintiff the right to amend. In this decision we think the Justice erred.

1st. The ground on which the motion was made was an objection to the complaint, which under the former practice, as well as the present, was properly taken by demurrer. It was a question arising on the merits and not on any irregularity. It depended on the general principles of law and of pleading, and not on the rules of practice that prevailed in the Courts of Justices of the Peace. If, however, we could overlook this error, in our desire to do substantial justice between the parties, yet the motion should not have been granted, without also giving the right to amend.

“The plaintiff should have all the rights awarded to him which he would have been entitled to, if the objection had been taken by demurrer. The sixty-fourth section of the Code, subdivision sixth, prescribes a demurrer as the appropriate remedy for such defect, and subdivision seventh provides as follows: ‘If the Court deem the objection well founded it shall order the pleading to be amended, and if the party refuse to amend, the defective pleading shall be disregarded.’ The language of the Code is imperative, and must apply to and control every case in which the defective pleading is susceptible of amendment, (13 Barb. 533.) The right to amend is to be incorporated in the order, inasmuch as the parties who appear in Justices’ Courts are not always acquainted with their rights, and might be ignorant of the necessity of asking for an amendment. The right to amend is peremptory, and not discretionary.

“2d. The time of granting the dismissal was also erroneous. The parties had met to try the cause, and had the Justice given the right to amend as he should have done, the order would have resulted in a new issue, and the preparation for trial would have been lost. This would entail great inconvenience on parties, and it would be far more conducive to the ends of justice that the rule should be in-

flexible, *that no motion be entertained* which is a substitute for a demurrer after the issue upon the merits has been joined, and the parties are ready with their witnesses for trial.”¹

The foregoing reasoning of the learned Justice who gave the opinion, will, as a general thing, be a safe guide for Justices of the Peace to follow in their decisions upon analogous cases.

The Answer.

By the provisions of the Code, the defendant's answer may contain a denial of the plaintiff's complaint, or any part thereof, *and he must give notice* of any defence he has against the plaintiff's claim, such as set-off, payment, recoupement of damages, statute of limitations, bankrupt discharge, and in fact any defence upon which he relies for a defence, or he will be precluded of giving evidence of it on the trial.

These pleadings are not required to be in any particular form, but must be stated in such manner as to enable a person of common understanding to know what is intended by the pleader.²

I think it may safely be laid down as the true rule in these courts, that if the party states to the Justice, in a plain manner, the substance of his claim, *either* as a cause of action, or as a defence, it is all that is required of him, and if he should make a mistake in his statement the Justice should allow him to correct it by amendment, at any time before final judgment upon such terms as to him appears just and proper.

8th Subdivision.

In case a defendant does not appear and answer, the plaintiff cannot recover without proving his case.

9th Subdivision.

In an action or defence, founded upon an account, or an instrument for the payment of money only, it shall be suffi-

¹ Hilliard vs. Austin, 17 Barb. 141. ² Code, sec. 164, sub: 4 and 5.

cient for a party to deliver the account or instrument to the Court, and to state that there is due to him thereon from the adverse party a specified sum, which he claims to recover or set-off.

10th Subdivision.

A variance between the proof on the trial, and the allegations in a pleading, shall be disregarded as immaterial, unless the Court shall be satisfied that the adverse party has been misled to his prejudice thereby.

11th Subdivision.

The pleadings may be amended at any time before the trial, or during the trial, or upon appeal, when, by such amendment, substantial justice will be promoted. If the amendment be made after the joining of the issue, and it be made to appear to the satisfaction of the Court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment shall be granted. The Court may also, in its discretion, require as a condition of an amendment, the payment of costs to the adverse party.¹

An application to amend a pleading is addressed to the discretion of the Court in which the suit is pending.²

And though a Justices' Court has power to allow amendments, error will not lie from a decision refusing an application to amend a pleading.³

Justices are required to allow amendments liberally in all cases where the rights and interests of the adverse parties will not thereby be put in jeopardy.⁴

12th Subdivision.

Execution may be issued on a judgment heretofore or hereafter rendered in Justices' Court, at any time within

¹ Code, sec. 64.

² *White vs. Stevenson*, 4 Denio, 193;
1 Denio, 139.

³ *Fulton vs. Heaton*, 1 Barb. 556;
12 Wend. 150; 15 Wend. 557.

⁴ New Code, 21, sub. 10 and 11; 1
Barb. S. C. R. 552.

five years after the rendition thereof, and shall be returnable sixty days from the date of the same.

13th Subdivision.

If the judgment be docketed with the county clerk, the execution shall be issued by him to the sheriff of the county, and have the same effect, and be executed in the same manner as other executions and judgments of the County Court, except as provided in section 63.

14th Subdivision.

The Court may, at the joining of issue, require either party, at the request of the other, at that or some other specified time, to exhibit his account on demand, or state the nature thereof as far forth as may be in his power; and in case of his default preclude him from giving evidence of such parts thereof as shall not have been so exhibited or stated.

15th Subdivision.

The provisions of this act, respecting forms of action, parties to actions, the rules of evidence, the times of commencing actions, and the service of process upon corporations, shall apply to these Courts.

It appears by the subdivisions of the foregoing section that the rules of pleading in Justices' Courts are governed by the various subdivisions as therein specified. The directions are plain and specific, and parties will have no difficulty in framing their pleadings so as to answer the requirements of the law as laid down therein.

Justices of the Peace have jurisdiction in suits against corporations, and may issue a summons as in other cases, which may be served on the president, or other head of the corporation, secretary, cashier, treasurer, a director, or managing agent thereof.

They are also now authorized to take and enter judgment upon the confession of the defendant, where the amount confessed shall not exceed two hundred and fifty dollars;

the confession to be taken as formerly in conformity with the Revised Statutes, and in pursuance of the following form.¹

The following forms may aid the party in answering, varying, of course, according to the facts in each case :

Form of Answer.

The defendant says he denies the complaint, and gives notice that the said cow sold to him was warranted to be good for milk, when in fact she is not, and he claims damages to \$20.

OR—That he has paid for the said cow.

OR—That the plaintiff is indebted to him for 30 bushels of potatoes at \$1 per bushel, and on book account to \$50.

OR—That he cut the said trees by plaintiff's consent, (or as the fact is.)

OR—That the said note was given upon the sale of a horse which the plaintiff sold to defendant, and warranted him sound, &c., when in fact he was not sound, and the defendant claims damages in this action by way of counterclaim against the said note.

OR—That there has been a former suit between the parties before A. B., Esq., of _____, on this same demand, and a verdict and judgment rendered in favor of _____, and he claims that suit a bar to this.

OR—That the plaintiff agreed to build a house for defendant, [here state substance of agreement,] and he failed to perform, and defendant claims damages for said non-performance to \$50, which he will recoupe in this action against the plaintiff's claim, and have a verdict for the balance.

The Justice has power to require either party at the joining of issue, to give the opposite party a bill of particulars on his account or demand, forthwith, or at such time as he shall designate, and in case of a neglect or refusal so to do, to preclude him of giving evidence of his claim or defence, which said bill *should* contain if given.

There are no other pleadings allowed in Justices' Court

¹ New Code, sec. 134.

but the complaint on the part of the plaintiff, and the answer by the defendant as above stated, except either party may demur to the pleading of his adversary as specified above, in order to test the sufficiency of the pleading demurred to, and which is to be disposed of as therein stated.

Since the adoption of the Code of Procedure there is no longer any such plea as the general issue, and there cannot be an answer in that form. It is one of the principal objects of the Code to abrogate the old forms of pleading, and bring the parties to a plain, concise and direct statement of the facts which constitute the cause of action, or the defence, in place of the general statement formerly in use.¹

The form of allegation and counter allegation was adopted with a view to compel the adverse party to disclose to each other the facts upon which they respectively rely, to uphold the claim upon the one side, and to maintain the defence upon the other by the proofs on the trial.²

It is proper to remark, that the plaintiff may demur to the notice of the defendant, as the facts stated therein should constitute a partial or complete defence, the sufficiency of which cannot be tested in any other way.

"The defendant may answer that the Justice has not jurisdiction." As for example, that the Justice has, since his election, become a tavern-keeper in fact; or that he has an interest in the matters to be tried; or, that he is so nearly related to the plaintiff, that he ought not to take cognizance of the suit; or, that the suit is for assault and battery, malicious prosecution, or the like.³

"The defendant may answer that the process issued illegally." As, that a warrant issued without oath; or, in favor of a non-resident plaintiff, without security; or, that a long attachment issued without the requisite proof, or bond.⁴

"The defendant may answer that the process is not, in substance, conformable to the statute." Although, as before

¹ *Fay vs. Grimstead*, 10 Barbour, 321; 7 Id. 80. ³ 13 John. 218; 13 John. 191; 21 Wend. 63; 7 John. 356.

² Id.

⁴ 12 John. 422; 1 Wend. 213; 3 Cow. 206.

observed, proceedings before a Justice are generally regarded with liberality, yet he must comply with the requirements of the statute. As, therefore, the substance of the several kinds of process is prescribed, the process must conform thereto, or the defendant may take advantage of the defect, if the objection be urged in time.

“The defendant may answer a defect in the service of process.” It is a valid objection to the return of a summons, that it does not state the *time and manner of service*. So also of an attachment, that the return does not state that a copy was left with the defendant, or at the last place of abode of the defendant, &c., as the case may be.¹

“The defendant may answer any matter relating to the plaintiff personally, which furnishes a legal objection to the commencement or continuance of the suit.” As, that the plaintiff is an infant, and has declared by attorney; or, is a married woman, and her husband should have joined with her as plaintiff; or, that the plaintiff, being a corporation, is wrongly named; or, that the plaintiffs, suing as husband and wife, are not married; or, that the plaintiff is misnamed, either in christian or surname. The law, however, knows of but one christian name, and the omission of a middle letter is immaterial. It is also a good plea that the plaintiff is a fictitious person.²

“Some matters relating to the defendant personally may be pleaded.” Thus, the defendant being a married woman and sued alone, may plead that her husband ought to have been joined with her.

Set-Off.

In the following cases, and under the following circumstances, a defendant may *set off* demands which he has against the plaintiff.³

1. It must be a demand arising upon judgment, or upon contract, *express or implied*, whether such contract be written or unwritten, sealed or without seal, and if it be founded

¹ 14 John. 481; 17 Wend. 517; 2 2 1 Chitty, 436; 5 John. 54; 4 Cow Hill, 517; 16 John. 121. 148; 19 John. 308.

³ 2 R. S. 165, sec. 50.

upon a bond, or other contract having a penalty, the sum equitably due by virtue of its condition only, should be set off.

2. It must be due to him in his own right, either as being the original creditor, or payee, or as being the assignee, or owner of the demand.

3. It must be a demand for real estate sold, or for personal property sold, or for money paid, or services done; or if it be not such a demand, the amount must be *liquidated* or be capable of being ascertained by calculation.

4. It must have existed at the time of the commencement of the suit, and must then have belonged to the defendant.

5. If there be several defendants, the demand set off must be due to all of them jointly.

6. It must be a demand existing against the plaintiff in the action, unless the suit be brought in the name of a plaintiff who has no real interest in the contract, upon which the suit is founded; in which case, no set-off of a demand against the plaintiff shall be allowed, unless as hereinafter specified.

7. If the action be founded upon a contract (other than a negotiable promissory note or bill of exchange) which has been assigned by the plaintiff, a demand existing against such plaintiff, or any assignee of such contract, at the time of the assignment thereof, and belonging to the defendant in good faith, before notice of such assignment, may be set off to the amount of the plaintiff's debt, if the demand be such as might have been set off against such plaintiff, or such assignee, while the contract belonged to him.

8. If the action be upon a negotiable promissory note, or bill of exchange, which has been assigned to the plaintiff after it became due, a set-off to the amount of the plaintiff's debt may be made of a demand existing against any person or persons, who shall have assigned, or transferred such note or bill after it became due, if the demand be such as might have been set off against the assignor, while the note or bill belonged to him.¹

¹ Driggs vs. Rockwell, 11 Wend. 504; 12 Wend. 356, (with some exceptions.)

9. If the plaintiff be a trustee for any other person, or if the suit be in the name of a plaintiff, who has no real interest in the contract upon which the suit is founded, so much of a demand existing against those whom the plaintiff represents, or for whose benefit the action is brought, may be set off, as will satisfy the plaintiff's debt, if the same might have been set off in an action by those beneficially interested.

10. But if such action is brought by the assignee of an insolvent, imprisoned, absent, concealed or absconding debtor, *no set-off shall be allowed* of any debt, unless in the cases provided in 1st vol. R. S. 778, § 7.

To entitle a defendant to a set-off, he must plead or give notice of the same, *specifying the nature* of his claim, with reasonable certainty at the time of joining issue, on a question of fact, upon the merits of the case.¹

If a defendant neglect to plead, or give notice of any set-off, which, according to the preceding provisions, might have been allowed to him on the trial of the cause, he shall be forever thereafter precluded from maintaining any action to recover the same or any part thereof.²

And if the demand which might have been set off, consisted of a negotiable note, or bill of exchange, no action shall be maintained thereon by any person who may derive title thereto from or through the defendant.

But the last preceding section shall not extend to the following cases:³

1. When the set-off shall be one hundred dollars more than the judgment which the plaintiff shall have recovered.⁴

2. Where a set-off consisted of a judgment in favor of the defendant, or belonging to him, rendered before the commencement of the suit in which the same might have been set off.

3. When a set-off shall have been claimed by him, and a balance exceeding one hundred dollars shall have been found in his favor, the defendant may maintain an action for such part of his demand as was not allowed to him as a set-off.

¹ 2 R. S. 165, sec. 51.

³ Id. sec. 58.

² 2 R. S. 167, sec. 57.

⁴ Sess. Laws, 1840.

4. Where the suit was commenced against the defendant by attachment, and he did not personally appear in such suit.

5. Claims in suit in any other Court, at the time of the commencement of the suit before the Justice.

A set-off is allowable, where the action is on an award, or on a bond for the non-performance or non-payment of an award.¹

And the sum due on a bond may be set off against any demand recoverable under the common counts.²

A tavern bill against any person other than a lodger, or traveler, for more than one dollar and twenty-five cents, is not the subject of set-off.³

A debt due to the defendant as a surviving joint creditor, may be set off against a demand on him in his own right.⁴

And on the other hand, a debt due from the plaintiff as a surviving debtor, to the defendant, may be set off against a debt due from the defendant to the plaintiff, in his own right.⁵

Where the note is transferred by the payee, for a valuable consideration, *before maturity*, and an action is brought thereon in the name of the holder, for his own benefit, the defendant cannot set off a demand against the payee. Such a case is not within the statute.⁶

A demand assigned to the defendant before the commencement of the suit may be set off, though he has not actually paid for it, but only *agreed* to pay.⁷

A declaration was filed on the 2d day of June, and served on the 8th; on the 7th the defendant purchased a note against the plaintiff. *Held*, that the note belonged to the defendant when the suit was commenced, and therefore might be a set-off.⁸

Where the goods belonged to the vendee, without pay-

¹ 5 John. 105.

² 15 Wend. 51.

³ 1 R. S. 678, sec. 11; 7 Wend. 326.

⁴ 5 T. R. 493; 1 Esp. R. 47 S. C.

⁵ 6 T. R. 582; 1 John. 34; 5 Serg. and Rawle, 86; Gra. Pr. 90.

⁶ 16 Wend. 659, Bronson J.

⁷ *Everett vs. Strong*, 5 Hill, 163, Cowen J.

⁸ *Johnson vs. Comstock*, 6 Hill, 10. Bronson Ch. J.

ment, whether they be sold on credit or not, and though the vendee agree to pay for them in *ready money*, yet, in an action brought, the vendee may set off a debt or claim due to him from the vendor against the price of the goods.¹

So where goods belonging to his principal, were sold by a factor, without knowledge of the ownership, on the part of the purchaser, the latter, in an action on the contract by the principal, for the price of the goods, was held entitled to set off a demand against the factor, although the sale was a *cash* sale, and the purchaser when he obtained the goods, did not intend to abide by his contract, but purposed to set off his demand against the factor.²

The defendant may set off a debt due him from the plaintiff, although he agrees to pay the plaintiff's demand in ready money.³

So, although he has positively agreed to account or pay over to the plaintiff, moneys which the plaintiff has authorized him to receive as his agent.⁴

A party holding a joint and several note against two makers, is not bound to set off the same in an action against him by one.⁵

A debt barred by the statute of limitations, cannot be set off; and the plaintiff may make the objection at the trial, when the set-off is introduced by way of notice, but the defendant may answer the objection, by showing an acknowledgment of the debt, or a promise to pay it within six years, the same as in an original action, even though nothing be said of such acknowledgment or new promise in his notice.⁶

It is a general rule that debts or demands between persons who are not parties to the suit cannot be set off, but there are several exceptions to this rule, (13 John. 9.) Thus the defendant may set off a bond executed by the plaintiff and signed by the obligee to the defendant, or any other debt assigned to the defendant, previously to the commencement of the action, although he could not have maintained an action upon it in his own name.⁷

¹ 1 East. 375.

² 24 Wend. 458.

³ 1 East. 375.

⁴ 15 Wend. 51.

⁵ 14 Wend. 161.

⁶ Buller's N. P. 180; 17 John. 330.

⁷ 12 John. 276; 8 John. 152; 17 John. 330; 19 John. 342.

But a judgment purchased by a defendant with a view to set it off, and with a condition that if he fails to obtain the set-off, the assignment shall be void, cannot be set off; to warrant this, the defendant must purchase absolutely.¹

A joint debt cannot be set off against a separate demand, nor a separate debt against a joint one, unless it be so agreed by the parties. But a debt due to a defendant as a surviving partner, may be set off against a demand on him in his own right, and *vice versa*.²

The assignment of a chose in action *need not* be in writing, a delivery of it for a good consideration is sufficient even in the case of a specialty, or a judgment, or mortgage, &c.³

In case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defence existing at the time of or before notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due.⁴

A court of equity will, it seems, enforce a set-off of cross demands where the defendant is insolvent. Where a defendant presents a demand as a set-off to the plaintiff's claim, which demand is legal and proper to be allowed if proved, and the court or jury pass upon it and disallow it, such demand cannot be set off in another suit between the same parties. The former verdict or judgment is conclusive, unless it is shown that the rejected claim was of such a nature that it could not have been legally allowed in the previous suit. If it appears affirmatively that the court or jury could not legally have allowed the claim as a set-off, the case will be taken out of the operation of the rule.⁵

Where a debtor has a set-off equally applicable to two demands against him, it is not for him to elect which of the demands he will satisfy by his set-off, but the court will direct the application according to the equities of the case.⁶

¹ 7 Cow. 469, 480.

² Barbour's Law of Set-Off, 56.

³ Id. p. 58.

⁴ Code, sec. 112.

⁵ 3 Comst. 475; sec. 150 of Code; 6 Barb. 28.

⁶ 4 Barb. 382.

Where a suit is brought upon an account by the assignee thereof, a promissory note of the assignor, held by the defendant at the time of the assignment of the account, but not then due, cannot be set off against such account.¹

Where, at the time of an assignment of a chose in action, an equitable right of set-off exists against the assignor, the assignee will take the chose in action, subject to such right of set-off.²

Judgment may be rendered in favor of the defendant in a Justices' Court for a set-off, proved on the trial, though no demand was established in favor of the plaintiff.³

Where a suit is brought on a contract by an assignee, and the defendant has a larger demand against the assignor, such set-off can only be made to the amount of the plaintiff's debt, and no judgment for a balance can be rendered against the plaintiff.⁴

Modifications in relation to Set-Offs, and Counter Claims under the Code.

The provisions of the Revised Statutes, (2 R. S. 154, § 12,) respecting set-offs, are so far modified by the Code as to admit of a set-off or counter claim on behalf of one or more of several defendants, where a several judgment may be had in the action between the plaintiff and any one or more of the defendants, as upon a joint and several promissory note. Therefore in an action upon a promissory note, signed by two persons, one as principal and the other as surety, a set-off of an indebtedness from the plaintiff to the principal may be allowed.

The Court say, that under the Code, the statute in relation to set-off is so far modified as to admit of a set-off or counter claim on behalf of one or more of several defendants, where a *several judgment* may be had in the action between the plaintiff and any one or more of the defendants, as upon a joint and several promissory note ; (see 8 Howard Pr. 454,) where two out of the three defendants had signed

¹ 3 Barb. 40.

² 2 Barb. 258.

³ Greenleaf vs. Low, 4 Denio, 168.

⁴ 3 Denio, 344.

the note as sureties for the third ; the Court allowed a set-off of a judgment in favor of the *principal defendant* alone against the plaintiff, and judgment was rendered for the defendants. That was a decision at a special term, it is true, but the Supreme Court in the Sixth Judicial District at a general term, recognized and affirmed it as good law, in the case of *Briggs vs. Briggs*, (20 Barb. 477.) The Court say, the only restriction under the Code is, that the set-off must be one existing in favor of a defendant against a plaintiff, between whom a *several judgment might be had* in the action. The present action is one of that kind, as was held in the case of *The People vs. Crane*, (8 Howard, 161.)¹

The right of set-off, when a chose in action is assigned, as it existed against the assignor at the time of the assignment or transfer, cannot be set up as a *counter claim*, (which is limited to the parties to the record,) is not embraced within its terms, and is excluded by the statute. It remains a subsisting right and *must be set up as a defence*.

The Court say, that the counter claim of the Code is a new invention, its precise force and meaning is to be fixed by judicial decisions. It obviously includes recoupement and a set-off, as between the parties to the record, and something more. It is the set-off of the Revised Statutes, together with the set-off of Courts of Equity, and yet something more.

It embraces all sorts of claims which a defendant may have against a plaintiff, in the nature of a cross action or demand, or for which a cross or separate action would lie within the limitations and restrictions contained in section one hundred and fifty.

Counter claim is the opposite of claim. The plaintiff makes a claim in his complaint against the defendant. The defendant, besides his defence, makes a *counter claim* against the plaintiff. The claims are of cross demands, as said by Judge Harris in 12 Howard, 310, and must, from the force of the terms, be limited to the parties to the record aside from the restriction of section one hundred and fifty of the Code. The right of set-off, therefore, where a chose in action

¹ 22 Barb. 647, and cases cited; 20 Id. 477.

is assigned, as it existed against the assignor, at the time of the assignment or transfer, cannot be set up as a counter claim; it remains as a subsisting right, and must be set up as a defence.¹

The Code in prohibiting the bringing of an action in the same county upon a Justices' judgment within five years after its rendition, does not prevent the use of such a judgment as a defence, set-off, or counter claim by an assignee thereof.²

Former Recovery.

Where the defendant relies upon showing, in his defence, a former recovery for the same subject matter, or that it has been passed upon by some court having cognizance of it, he must at the joining of issue, before the Justice, give notice of it in his answer.³

Before the Code of Procedure was passed, it was held, (in 2 Hill, 478, and 6 Hill, 114,) by the Court, that evidence of a former suit for the same cause of action, might be given in evidence under the general issue and without notice, but that rule is abrogated by the Code, and *notice must* be given with the answer, if the defendant desires to avail himself of the privilege of giving evidence of it on the trial. The Justice, however, would allow the defendant to amend his notice, by giving notice afterwards as in other cases, and upon the same terms.

If there be several causes of action set up in the complaint, some one or more of which are for the former cause of action, and some not, the defendant's notice may be made to meet that cause of action.

The form of the notice may be simple and plain, stating simply that such a cause of action has been adjudicated by such a court, (naming the court,) and the parties.

When a verdict shall have been rendered in any action, the plaintiff shall not thereafter be nonsuited, but judgment shall be rendered upon the matter found by such verdict.⁴

¹ 13 Howard Pr. 84.

² 12 John. 455.

³ Clark vs. Story, 29 Barb. 295.

⁴ 2 R. S. 282, sec. 1.

The plaintiff may elect to become non-suited, after a trial by jury, and before their verdict is rendered ; but when a demand has been once finally submitted to a *jury*, their verdict is a bar to any other suit for the same cause, notwithstanding the jury may have rejected such demand, for want of proof, or disregarded it for any other cause, and notwithstanding the Justice may have neglected to render judgment upon the verdict.¹

If a Justice, to whom a cause is finally submitted, neglect to render *any judgment* within the four days allowed him by statute, it is no bar to a second suit for the same cause of action.²

A Justice of the Peace must enter judgment upon the verdict of a jury immediately upon its being rendered, and if he omit to do so until the next day, no judgment can be given by him.³

Determining the amount of costs to be paid by the losing party, is parcel of the act of rendering judgment.

Accordingly where a Justice upon a verdict being given, immediately entered it in his docket, but omitted to set down the items of costs until a subsequent day, and did not foot up the amount until eight days afterwards, *held* erroneous, and the judgment was reversed.⁴

A former suit between the same parties is no bar to a second action for the same demand, where the validity of the plaintiff's claim was not passed upon in the former suit, the referees in that suit reporting against the plaintiff, expressly upon the ground that his action was prematurely brought.⁵

A party setting up a former recovery in bar of a second suit, must show that the subject matter of the second suit was directly in issue in the former suit, and that the verdict and judgment in that suit were directly upon the points attempted to be litigated in the second suit, and necessarily involved their consideration and determination by the jury.

¹ 5 John. 346; 2 R. S. 176, sec. 119; ³ Sibley vs. Howard, 3 Denio, 72, 6 John. 168; 10 John. 365; 9 Wend. Bronson Ch. J.; 2 Denio, 26, 287; 12 Wend. 504; 2 John. 181. Bronson Ch. J.; 6 Hill. 88.

² 5 Hill, 60, Nelson Ch. J.

⁴ Id.

⁵ 5 Barb. 469.

A former recovery in an action by the vendor, against the vendee for the price of a part of the property delivered under the contract, is a *bar* to a suit by the vendee against the vendor for damages for the non-fulfilment of the contract.¹

A former recovery in which the same matter was tried upon the merits, may be given in evidence without being specially pleaded, wherever the party, plaintiff or defendant, had no opportunity to plead the recovery, though received in evidence under the general pleadings, is as conclusive as in cases where the matter is specially pleaded.²

The judgment of a court of competent jurisdiction upon a question directly involved in the suit, is conclusive in a second suit between the same parties, depending on the same question, although the subject matter of the second action be different. Thus, where A. took from B. a bill of sale of certain personal property, and C. afterwards levied upon the property by virtue of attachments in favor of B.'s creditors, and A. subsequently took and converted to his own use *a part of the property* for which C. sued him and recovered judgment in a Justices' Court, on the ground that the bill of sale was fraudulent and void as against creditors. *Held*, that the judgment was conclusive upon the question of fraud in an action of replevin afterwards brought by A. against C. in the Supreme Court to recover *the residue of the property*; *Held, further*, that parol evidence was admissible in the second suit, for the purpose of showing what questions were controverted in the first action, and the grounds upon which it was determined. In the first suit the complaint went for *all the property*, but it appearing on the trial that the defendant had converted only certain specified articles, the plaintiff withdrew his claim as to the residue, and recovered judgment only for the value of the articles converted. *Held*, that this was not splitting up a single cause of action, and therefore that the plaintiff in that suit might, in a second action, brought against him for the residue of the property, insist upon his title thereto under the levy.³

¹ 4 Barb. 36.

³ Doty vs. Brown, 4 Comstock, 71.

² 4 Barbour, 457.

The judgment of a court of competent jurisdiction is final and conclusive upon the parties, not only as to the matter actually determined, but as to every other matter which the parties might have litigated in the cause, and might have had determined. A fact put in issue by the record, and found by the judgment of a court possessing the requisite jurisdiction, cannot be again litigated by the parties or their privies.¹

It is a fundamental rule, that the judgment of a Court of competent jurisdiction between the same parties or privies, upon the same matter or subject, coming in question in another suit, is final and conclusive on all points, directly involved and necessarily determined.²

A judgment in Justices' Court in favor of a surgeon for professional services, is a bar to any action by the defendant against him for malpractice in performing such service.³

Where a Justice of the Peace decided a cause before him, and made upon the papers in the suit a memorandum of his judgment within four days after the final submission to him. *Held*, that the judgment was regular and valid, although no entry thereof was made in his docket until after the lapse of four days.⁴

In the case of *Dexter vs. Broat*, (16 Barb. 337,) Gridley J. says: "A recovery in a former suit, brought against *another person* for the same cause of action involved in the second suit, and the payment and satisfaction of the judgment, is a bar to a second suit; and if the amount of the judgment previously recovered is tendered to the plaintiff, he has no right to refuse to receive the money, and to bring an action for the same cause of action against another person, on the ground that he has the right to elect of whom he will collect the damages.

"Payment of the judgment to the Justice before whom the same was recovered in good faith, and without any dissent or directions to the contrary by the plaintiff, is a *satisfaction of the judgment*."

¹ 3 Comstock, 512, Jewett J.

² Williams vs. Fitzhugh, 44 Barb. 321, and cases cited.

³ Gates vs. Preston, 41 N. Y. 113; 3 Seld. 352.

⁴ Walrad vs. Shuler, 2 Comst. 134.

Again, in *Staples vs. Goodrich*, (21 Barb. 317,) *Bockes J.* says: "It has long been well settled that an entire and indivisible demand cannot be split up by a party, so as to form a basis of two actions; that if a plaintiff bring an action for a part only of an entire and indivisible demand, the judgment in that action is a conclusive bar to a subsequent suit for another part of the same demand. (*Bender-nagle vs. Cocks*, 19 Wend. 207; *Colvin vs. Corwin*, 15 Id. 557; *Guernsey vs. Carver*, 8 Id. 492; *Stevens vs. Lockwood*, 13 Id. 644; *Waterbury vs. Graham*, 4 Sandf. 215; *Davis vs. Talcott*, 14 Barb. 611, and many other cases cited.)

Plea of Title.

§ 55. In every action brought in a Court of Justice of the Peace, where the title to real property shall come in question, the defendant may, either with or without other matter of defence, set forth in his answer, any matter showing that such title will come in question. Such answer shall be in writing, signed by the defendant or his attorney, and delivered to the Justice. The Justice shall thereupon counter-sign the same, and deliver it to the plaintiff.¹

§ 56. At the time of answering, the defendant shall deliver to the Justice a written undertaking, executed by at least one sufficient surety, and approved by the Justice, to the effect that if the plaintiff shall, within twenty days thereafter, deposit with the Justice a summons and complaint in an action in the Supreme Court, for the same cause, the defendant will, within 20 days after such deposit, give an admission in writing of the service thereof. Where the defendant was arrested in the action before the Justice, the undertaking shall further provide that he will, at all times, render himself amenable to the process of the Court, during the pendency of the action, and to such as may be issued to enforce the judgment therein. In case of failure to comply with the undertaking, the surety shall be liable, not exceeding one hundred dollars.

If the defendant omits within the prescribed time, to

¹ Code of Procedure, sec. 52.

admit service of the summons and complaint, the Court cannot grant leave to admit service thereof.

§ 57. Upon the delivery of the undertaking to the Justice, the action before him shall be discontinued, and each party shall pay his own costs. The costs so paid by either party shall be allowed to him, if he recover costs in the action to be brought for the same cause in the Supreme Court. If no such action be brought within thirty days after the delivery of the undertaking, the defendant's costs before the Justice may be recovered of the plaintiff.¹

§ 58. If the undertaking be not delivered to the Justice, he shall have jurisdiction of the cause, and shall proceed therein; and the defendant shall be precluded in his defence from drawing the title in question.

§ 59. If, however, it appear on the trial, from the plaintiff's own showing, that the title to real property is in question, and such title shall be disputed by the defendant, the Justice shall dismiss the action, and render judgment against the plaintiff for the costs.

§ 60. When a suit before a Justice shall be discontinued by the delivery of an answer and undertaking, as provided in sections 55, 56 and 57, the plaintiff may prosecute an action for the same cause, in the Supreme Court, and shall complain for the same cause of action only, on which he relied before the Justice; and the answer of the defendant shall set up the same defence only which he made before the Justice.

§ 61. If the judgment in the Supreme Court be for the plaintiff, he shall recover costs. If it be for the defendant, he shall recover costs; except that upon a verdict, he shall pay costs to the plaintiff, unless the Judge certify that the title to real property came in question on the trial.

§ 62. If, in an action before a Justice, the plaintiff have several causes of action, to one of which the defence of title to real property shall be interposed, and as to such cause, the defendant shall answer and deliver an undertaking, as provided in sections 55 and 56, the Justice shall discontinue the proceedings as to that cause, and the plaintiff may com-

¹ Davis vs. Jones, 4 Howard, 340; 3 Code R. 63.

mence another action therefor in the Supreme Court. As to the other causes of action, the Justice may continue his proceedings.

Whenever the defendant desires to put in a plea of title, instead of pleading the general issue and giving notice as heretofore required, he may set forth in his answer any matter, showing that such title will come in question, which must be signed by the defendant or his attorney [the person who appears for him meaning,] and delivered to the Justice, who must countersign it, and deliver it to the plaintiff.

He must also deliver to the Justice a *written* undertaking, so called, with one or more surety, as required by the 56th section of the act. The answer may be as follows :

IN JUSTICES' COURT—Before F. Butler, Justice.

JOHN BELL, }
agt }
 PETER STOW. }

The defendant for answer, says he denies the allegations in the complaint, and he further says that the land where the alleged trespass was committed is the land of the defendant, and he claims title to the same.

PETER STOW.

Countersigned, May 30, 18 .

F. BUTLER, Justice of the Peace.

Any other short form will answer, varying, of course, according to facts in each particular case.

Or This.

(Same as before to the word, says,) that the shingles for which the plaintiff claims damages were manufactured from timber taken from the defendant's land, and he claims title to the same.

PETER STOW.

Countersigned, May 20, 18 .

F. BUTLER, Justice of the Peace.

If there should be any claim made in the complaint, other than the one where the defence of title is set up, the defendant can put out in his answer to that part of it, and the Justice has jurisdiction to go on and try that issue in pursuance of the 55th section of the Code.

Form of an Undertaking.

Whereas, in a suit before _____; Esq., one of the Justices of the Peace of the county of Oneida, wherein John Bell is plaintiff, and the said Peter Stow is defendant, the said Peter Stow has set forth in his answer matter, showing that the title to land will come in question on said trial.

Now, therefore, we Peter Stow and Richard Roe, hereby undertake and promise to, and with the said John Bell in the sum of one hundred dollars, that if the said Peter Stow shall, within twenty days from this date, deposit with the above named Justice, a summons and complaint in an action in the Supreme Court for the same cause, the said Peter Stow will, within twenty days after such deposit, give an admission in writing of the service thereof.

PETER STOW,
RICHARD ROE.

Dated May 20, 18 .

If the defendant is under an arrest, by virtue of a warrant, then, immediately after the word "thereof," add, and that he will at all times render himself amenable to the process of the said court, during the pendency of the action, and to such as may be issued to enforce the judgment therein.

JOHN BELL,
RICHARD ROE.

Dated May 20, 18 .

§ 56. The undertaking must be approved by the Justice.

The Justice's approval may be indorsed upon the undertaking, as follows:

"I approve the within undertaking and the surety therein named. _____, Justice."

May 20, 18 .

The subsequent proceedings are plainly pointed out in the subsequent sections of the act.

An *oral* plea or notice of title in Justices' Courts, unaccompanied by an undertaking pursuant to the statute, is a nullity, and the defendant cannot avail himself of the notice at the trial, though it was received at the time, without objection on the part of the plaintiff.¹

¹ 6 Hill, 342, Bronson J.

In the case of *Weeks vs. Stroble*, decided in the Ulster County Court, found in 36 How. 123, it was decided that a defendant in pleading *title to land* in a Justices' Court is not restricted to interposing it at the *time of joining issue* as required by the Revised Statutes, but may under the Code, put in his answer of title and undertaking afterwards.

Under the Code of Procedure a defendant in a Justices' Court, who would interpose a plea of title is not absolutely required to do so at the time of joining issue, as under the Revised Statutes, but this, like any other defence, may be interposed by way of amendment at any time before trial, whose substantial Justice shall be promoted thereby. In an action in a Justices' Court to recover expenses of making a line or division fence on the boundary between the lands of the parties, an answer alleging that the fence in question was not built on the true line, but on the defendant's land, sufficiently involves the question of title to oust the jurisdiction of the Justice.¹

The plaintiff in a Justices' Court cannot litigate any other question of title, except the question of actual possession at the time of the alleged injury; and although that question may be litigated in a Justices' Court, yet it does not deprive the Justice of jurisdiction on the ground that the title to land comes in question.²

"The Legislature have provided," that if it appear on the trial, from the plaintiff's own showing, that the title to land is in question, which title shall be disputed by the defendant, the Justice shall dismiss the cause, and the plaintiff shall pay the costs.³

"The Supreme Court have decided," that though the plaintiff in a Justices' Court give evidence of title to lands the Justice is not *bound* to dismiss the cause unless such title be disputed by the defendant.⁴

Though it appear in a Justices' Court from the plaintiff's own showing that the *title to lands* is in question, and the Justice improperly refuse to dismiss the cause, his judg-

¹ *Hinds vs. Paige*, 6 Abb. N. S. 58.

³ Code, sec. 59.

² 6 Hill, 537.

⁴ *Adams vs. Beach*, 6 Hill, 271.

ment will not be void for want of jurisdiction, but only voidable for error.¹

The Justice may properly proceed and render judgment, notwithstanding evidence of title to lands be given by the plaintiff, if the defendant do not expressly dispute such title, nor move to have the cause dismissed.²

Where, in an action of trespass *quære clausum fregit*, prosecuted in a Justices' Court, the defendant justifies himself on the ground that the *locus in quo* is a public highway, the Justice is deprived of jurisdiction, and it is his duty to dismiss the cause; and if he proceed to try the question of the existence of a highway, and render judgment, such judgment will be reversed.

It appears from the authorities cited, that the Justice may try the question of actual possession of lands in all cases; and unless the defendant dispute the plaintiff's title by raising the *specific objection* on the trial, the plaintiff may introduce his paper titles for the purpose of showing his possession.³

A mere license does not draw the title to land in question within the statute in relation to the jurisdiction of Justices.⁴

Where the question is, whether the defendant has obstructed a certain river which the plaintiff insists is a public highway, is such a question as a Justice may lawfully try, to entitle a defendant to a dismissal of a cause pending before a Justice, on the ground that the title to land comes in question, he must call the Justice's attention specially to the objection, by at least disputing the title of the plaintiff.⁵

But where the issue in a Justices' Court is fraud, and the title to land only collateral, a fact from which the main issue may be inferred, evidence of a title in another, instead of the defendant, may be received.⁶

So where in a suit in a Justices' Court the title of neither party is disputed, nor denied, though evidence be given concerning title, it does not oust the Justice of jurisdiction.⁷

¹ 5 Id. 44.

² 19 Wend. 373.

³ 6 Hill, 33.

⁴ 7 Barb. 74; 18 Wend. 649; 10 Wend. 565.

⁵ 8 Barb. 239, and cases cited.

⁶ 54 Barb. 34.

⁷ 2 Keyes, 618, Boyer vs. Schofield.

The case of Ehle and Sart vs. Quackenboss, (6 Hill, 537,) is of so much importance to Justices of the Peace, in showing them what kind of evidence it is proper for them to receive in relation to land, without involving the question of title, that I have deemed it proper to insert the case at length. It is as follows :

EHLE AND SART vs. QUACKENBOSS.

The question of actual possession of lands is not one of *title* within the meaning of 2 R. S. 226 § 4, and a Justice of the Peace may therefore try and determine it.

Accordingly where the plaintiff in an action of trespass *quare clausum fregit*, brought in a Justices' Court gave evidence tending to show that he was in the actual possession of the *locus in quo* at the time of the alleged trespass was committed. *Held*, that the defendant had a right to give counter evidence and prove possession in himself.

Error to the Montgomery Common Pleas.

Ehle and Sart sued Quackenboss in a Justices' Court, and declared in trespass for that the defendant on the 1st of June, 1841, and on divers other days, &c., by his cattle, horses, &c., broke and entered the plaintiff's close, &c. The defendant pleaded the general issue, and gave notice that he would prove in defence of the action that he was the occupant of the *locus in quo* under license from the owner, and that his cattle, &c., were lawfully depasturing thereon. On the trial it appeared that the *locus in quo* was a farm in Canajoharie, and the plaintiffs, to establish their possession, proved various acts done by them on the farm during the season of 1841, such as sowing grain, mowing grass, making fences, &c. .

The defendant, to rebut this evidence, offered to show that he himself lived upon the farm, and had done so for a long time, and that he was in possession when the acts complained of were committed. This evidence was objected to on the ground that it would raise a question of title, and the Justice excluded it. He rendered judgment against the defendant, which was reversed by the Common Pleas on certiorari, whereupon the plaintiffs brought error.

BY THE COURT—Beardsley J. On the trial of this cause

the plaintiffs gave no evidence of title in themselves, nor did they attempt to prove their possession to be rightful. They relied, as they had a right to do, on their actual possession of the land, for that is enough against any one but the rightful owner. As the defendant had not interposed a plea or notice of title, he was precluded from all evidence drawing that in question.

But as the plaintiffs sought to recover on the ground of a naked possession of the land, that was a *fact* which the defendant had a right to contest and disprove if he could. Evidence of this character does not draw *the title* to land in question, and the fact of possession is one which a Justice has an unquestionable right to try. The statement of what testimony was offered by the defendant at the trial, is not very clear, but the ground on which it was rejected sufficiently shows the nature of it. I understand the offer was to show that the defendant, and not the plaintiffs, was in the actual possession of *the premises* at the time of the alleged trespass, and that the defendant had been in possession for a long time, and the testimony was excluded as I read the return, because it would draw the title in question. But in this the Justice was mistaken.

The proposed testimony related to the fact of possession, irrespective of title, and should have been received. If the defendant was in actual possession, as he offered to show, that was of course fatal to the plaintiff's action. (See *Campbell vs. Arnold*, 1 John. R. 511, 512; *Wickham vs. Freeman*, 12 Id. 183; *Van Rensselaer vs. Radcliffe*, 10 Wend. 639, Cow. Tr. 370.)

The Revised Statutes declare that a Justice of the Peace shall have no cognizance of any action, where the title to land shall in any wise come in question, as hereinafter provided, (2 R. S. 226, § 4) and they afterwards point out the manner in which title may come in question so as to exclude the jurisdiction of the Justice. (Id. 237-8, § 59 to § 63.) But in my opinion, the term title as used in the statute, does not embrace the fact of possession, nor any right founded on possession alone. Undoubtedly possession is a necessary ingredient in a *complete title* to land, for such title has sev-

eral stages or degrees, viz: 1st. Mere possession or actual occupation without pretence of right. 2d. The right of possession which one man may have, while another has the possession in fact, and 3d. The mere right of property which may exist without possession or right of possession. (2 Blackstone Com. 195 to 199.) These being united constitute what Blackstone calls a complete legal title.

But the term title, as used in the statute under consideration does not embrace these different degrees or stages of right. It is limited to the *right of possession*, for where that is the question before a Justice he has no jurisdiction of the case.

The defendant is precluded from all evidence on that point and can only raise the question by plea or notice, in which case the action must be discontinued, and if the plaintiff's case requires such evidence on their part, it cannot be received, but the case must be dismissed.

In short, I understand the word title, as used in the statute, to mean precisely what it means in reference to the common law action of ejectment. It is synonymous with the *right of possession*. That is the title which is tried in the common law action of ejectment, and that is the right which may be pleaded to oust the jurisdiction of a Justice. It does not embrace the idea of possession in fact, nor that of the mere right of property.

The latter cannot be material in the action of trespass, nor in that of ejectment at common law. It is a right to be tried only in a real action, at least it was so until the Revised Statutes extended the remedy by ejectment to such cases: (Adams on Ejectm. 10.)

If the question of actual possession is to be regarded as a question of title, within the meaning of the statute under consideration, let us see to what it must lead. The plaintiffs here attempted to recover on the ground of possession in fact, and they went into testimony for that purpose. If this brought the title in question, the case should have been dismissed on their own showing, (2 R. S. 237, § 63,) and therefore the judgment in their favor was erroneous. A question of mere possession, however, is not one of title.

Judgment affirmed.

Where it appears in an action before a Justice of the Peace that the title to land is in question, and that such title is disputed by the defendant, the Justice is prohibited from taking cognizance of the action, and he is bound to dismiss it.¹

If he proceeds in the action, his proceedings are without authority, and his judgment void for want of jurisdiction.² An action by an assignee of the lessor against the assignee of the lessee for arrears of a perpetual rent reserved by a lease in fee, brings in question the titles to real estate, and if upon the trial the plaintiff's claim is disputed, a Justice of the Peace is ousted of jurisdiction.

Where, upon a trial in a Justices' Court, a deed of real estate is offered in evidence, not to establish a title to land, but to show the performance of a condition precedent to the defendant's liability upon the instrument sued on, the justice should receive the deed the same as other evidence, and retain jurisdiction of the cause.³

Under the former statute, the language of whose restriction was, "where the title to land shall in any wise come in question,"⁴ it was held that where either a public or private right of way was in question in the action, the suit must be dismissed, as involving a question of title.⁵ If the plaintiff seeks to recover on the ground of a naked possession of land, the defendant may disprove his possession. Such evidence does not draw the title in question, and the fact of possession is one which the Justice may try.⁶ The defendant contracted to sell land to the plaintiff, and gave him possession, reserving a right to re-enter for non-payment of the purchase money; upon a failure to pay he re-entered, and the plaintiff brought his action for an unlawful entry. Upon these facts appearing, it was held, the right of possession given the plaintiff by the contract was a mere license, and the only question turning upon its revocation, there was no title in question, and the Justice might entertain jurisdiction of the case.⁷

¹ Gale vs. Hill, 43 Barb. 44.

² Main vs. Cooper, 25 N. Y. 180.

³ Nichols vs. Bain, 42 Barb. 353.

⁴ 2 R. S. 226, sec. 4, sub. 2.

⁵ 6 Wend. 465; 15 Id. 338; 19 Id. 373; 6 Hill, 342.

⁶ 6 Hill, 537.

⁷ 7 Barb. 79.

The Justice cannot dismiss the action under section fifty-nine of the Code, merely because the plaintiff gives in evidence a conveyance of the land, but only where the title is disputed. The giving such evidence need not necessarily show that the title of real property is in question, as where a lease is shown in order to maintain an action to recover rent. It is only where it appears from the plaintiff's showing that the title is in question, that the Justice is bound to dismiss it. And though it be material for the plaintiff to show his title, yet if the defendant neither objects to the evidence, disputes its effect, nor moves for a dismissal of the cause, the title is not disputed within the meaning of the statute, and a judgment rendered for the plaintiff is valid.

Under the provision of the 60th section of the Code, that the plaintiff in the action in the Supreme Court shall complain for the same cause of action on which he relied before the Justice, and the answer shall set up the same defence which the defendant made before the Justice, it is held that the exact form of words which were used in pleading before the Justice need not be used, and that the parties are only confined to the same substantial cause of action or defence; and where the defendant before the Justice pleaded two distinct matters of defence, he may abandon one of them, but he cannot substitute a new one which was not pleaded before the Justice.¹

1 7 How. Pr. R. 406.

CHAPTER VII.

ADJOURNMENTS.

I. On Motion of the Justice.

At the time of the return of either a summons or attachment, or of joining issue without process, a Justice may, in his discretion, and with or without the consent of parties, adjourn the cause not exceeding eight days.¹

A Justice can in no case, adjourn a cause commenced by a warrant, on his own motion; nor can he exercise that right in a suit commenced by a summons or attachment, at *any other time* than on the return of the process.²

The discretion allowed to a Justice in adjourning, in the case above stated, is not wholly an arbitrary discretion; it must be soundly and judiciously exercised.³

While on the one hand he ought not to adjourn the cause on his own motion, when satisfied it will injuriously affect the rights of either party; on the other, he should not refuse an adjournment where it is evident the situation of either party really demands it. In one case, where the defendant appeared before the Justice on the morning of the return day of the summons and applied in writing for an adjournment, on account of his child being dangerously sick, which was denied by the Justice, the Supreme Court held that the situation of the defendant's child was such as ought to have induced the Justice to put off the trial.

The Justice has also the right to adjourn the trial of a cause to a place different from the one mentioned in the summons, without the consent of parties, both parties having appeared at the return day.⁴

Where the defendant was summoned to appear before the Justice on a certain day and at a certain place, and the

¹ 2 R. S. 169, sec. 67; 10 Wend. 497. ² 8 John. 426; 14 John. 841.

⁴ 1 Cowen R. 112

³ Id. 169, sec. 68; 2 John. 192; 1 Cowen, 284.

parties appeared, but the Justice did not attend, and sent a written notice to the parties that he had adjourned the cause to a future day, (stating the day,) on which day he attended with the plaintiff, and the defendant not appearing, the cause was heard on the part of the plaintiff, and judgment rendered against the defendant, *it was held* that the adjournment was irregular and the subsequent proceedings by the Justice were null and void.¹

It appears clear that in all cases of an adjournment, the Justice must be present in proper person and can never do this by sending a note to the parties, informing them that he has adjourned the cause to some other time.

"An agreement before the Justice" that the cause shall be adjourned three days, and that then if S. do not attend as a witness, the Justice may adjourn for such reasonable time as he may deem necessary to procure his attendance, is a valid and binding agreement and cannot be revoked without the consent of both parties.²

If such agreement does not provide for security to be given, the Justice may adjourn without security, this being waived by the silence of the parties.³

Where a cause in a Justices' Court stands adjourned to a particular day, the Justice cannot, before the day arrives, (upon information that both parties have consented) adjourn the cause to a later day. Therefore where a cause stood adjourned to the 15th day of October, and on the 10th day of that month a person went before the Justice and made oath that both parties had authorized him to appear and adjourn the suit to some day beyond the 1st day of January then next, and the Justice accordingly adjourned it to the 9th day of January, on which day the plaintiff only appeared and obtained judgment. *Held*, that the adjournment was extra judicial, and that the cause was out of Court. The Court say the oath administered to W. Sweet on the 10th of October was *unauthorized*, not being in Court.⁴

¹ West vs. Critsinger, 4 John. R. 3 Id.

117.

⁴ Deland vs. Richardson, 4 Denio, 95.

² 1 Cowen, 255.

II. *On Motion of the Plaintiff.*

At the time of the return of a summons or attachment, or the joining of issue without process, the plaintiff will be entitled to an adjournment, to a time to be fixed by the Justice, not exceeding eight days thereafter; if he, or his attorney shall, *if required* by the defendant, make oath that he cannot, for want of some material testimony or witness, safely proceed to trial.¹

A cause commenced by warrant, at the suit of a non-resident plaintiff, may be adjourned on the application of such plaintiff, supported by his oath, that on account of the absence of some material testimony or witness, he cannot then safely proceed to trial.²

In this case, the adjournment *must* be to a day, not less than *three*, nor more than *twelve* days thereafter, unless the parties and Justice shall otherwise agree.³

Upon such adjournment, the Justice must discharge the defendant from custody; but the cause will not be discontinued by such discharge, and at the adjourned day, the same proceedings must be had, as on the return of a summons personally served.⁴

When an adjournment becomes necessary, in consequence of the refusal to testify, and commitment of a witness, the Justice is required to adjourn, at the request of the party, in whose favor the witness attended, from time to time, until such witness shall testify, or be dead, or insane.⁵

Whenever a short summons is issued in favor of a non-resident plaintiff, no longer adjournment shall be allowed than in case of a warrant, at the instance of a *non-resident plaintiff*, unless the parties otherwise agree.⁶

When a commission shall be applied for and granted, on the part of the plaintiff, pursuant to the provisions of an act entitled, "An act to amend articles 8 and 13, title 4, chap. 2, part 3 of the Revised Statutes, relating to Courts held by Justices of the Peace," passed April 18, 1838, the plaintiff

¹ 2 R. S. 169. sec. 69.

² Id. sec. 70, sub. 3.

³ Id. sec. 73.

⁴ Id. sec. 72.

⁵ Id. 200, secs. 279, 280.

⁶ Sess. Laws 1831, p. 402, sec. 32.

shall be allowed the same time and privileges of adjournment to which the defendant is now entitled by law.¹

The same rule governs cases of adjournments when the defendant is a non-resident, and is sued with a short summons, as in cases of non-resident plaintiffs.

Although a Justice may adjourn a cause where the defendant does not appear and there is no issue joined, he cannot hold the cause open for any number of days from the return of the summons; and where a cause was held open for four days and then tried, the defendant not appearing, *held erroneous*. The Court say, on an adjournment to a day certain, the defendant would know when to appear, but if the cause can be kept open for an indefinite period, the defendant could only be sure of being present at the right time, by taking up his quarters with the Justice until a new movement should be made.²

An adjournment of a cause in a Justices' Court cannot be claimed as matter of right after a jury has been impaneled.³

III. On Motion of Defendant.

In a case commenced by warrant, at the suit of a non-resident plaintiff, an adjournment may be allowed upon the application of the defendant, supported by his oath that he has a good defence to the action, and is not ready to proceed to trial. And in such case it shall not be granted, unless the defendant will consent that any witness on the part of the plaintiff, who shall be then attending, may be then examined on oath by such Justice, his testimony reduced to writing, certified by the Justice, and left with him to be read on the trial of the cause.⁴

On an application by a party for an adjournment in a Justices' Court, the Justice has the right to allow the opposite party to introduce evidence showing that the application is not made in good faith and is groundless. An appellate Court will not interfere with the discretion of a Justice of

¹ Sess. Laws 1841, p. 112, sec. 1.

² 4 Denio, 160, and cases cited.

³ 7 Hill, 77.

⁴ 2 R. S. 169, sec. 70, sub. 2.

Sealed and delivered in the presence of, }	[L. S.]
and the surety approved by }	[L. S.]
Justice.	

When a suit is commenced either by summons or attachment, or by joining issue without process, in all cases arising upon contract, the defendant will be entitled to an adjournment, upon complying with the following requisitions :¹

1. The application must be made at the time of joining issue.

2. If required by the plaintiff, or the Justice, he must make oath that he cannot safely proceed to trial, for the want of some material testimony or witness, to be specified by him.

This oath need not necessarily be made by the defendant in person, for he may not be acquainted with the facts required to be shown, in order to entitle him to an adjournment. And it is said in one case, that the defendant's agent or attorney may make the requisite oath, unless some special cause be shown against it.² But in a subsequent case it is decided that this rests in the sound discretion of the Justice ; and that unless it appear that the defendant cannot attend, the oath of an attorney or third person *may* be refused.³ It is hardly to be supposed that the inability of the defendant to attend must, in all cases be shown, to authorize a Justice to grant an adjournment upon the oath of a third person. Cases frequently arise in which a defendant is totally ignorant of the facts which go to establish his defence ; for instance, where the suit is against him, as principal, for some act of his agent committed in his absence and without his knowledge. And this right of the Justice to adjourn, should, in most cases, be liberally exercised ; and he would hardly be considered as abusing the discretion vested in him, should he grant an adjournment upon the oath of an attorney, to whom the defendant had intrusted the management of his cause, and to whom also he had communicated the facts going to make out his defence, with the names of the

¹ 2 R. S. 170, sec. 74.

³ 13 Id. 228.

² 1 John. 514.

witnesses ; and this, although the defendant might be able to attend in person. An adjournment, after joining issue, is so much a matter of course in litigated causes, that a strict compliance with the letter of the statute in this respect should not, except in extraordinary cases, be exacted. The parties, in nine cases out of ten, make no preparation for trial until after issue joined ; for until that time, neither of them can legally know what will be the claim or defence of his antagonist ; and hence, the statute does not require that either party, in order to obtain an adjournment, in the first instance, should show that he has used any effort to procure his witnesses.¹

The absent testimony or witness must be specified by the defendant, if he is required to do so by the plaintiff or Justice. He is not bound to detail *all* the testimony or the names of *all* the witnesses ; it is sufficient to give the name of one absent material witness, without whose testimony he cannot safely proceed to trial. By doing this, he makes out a case for an adjournment, and that is all that can be required of him. Any other rule would impose a great hardship upon the defendant. If he refuses to name his witness, or to state where he resides, the adjournment may be denied.²

3. If required by the plaintiff, he shall give security, as hereinafter directed.

Such adjournment shall be for such *reasonable* time as will enable the defendant to procure his testimony, or witness, not exceeding ninety days.

Form of Bond for Adjournment in Cases Arising upon Contract.

KNOW ALL MEN BY THESE PRESENTS, That we are held and firmly bound to _____ in the penal sum of two hundred dollars, to be paid to the said obligee, his representatives and assigns, to the which payment well and truly to be made, we bind ourselves, our heirs and personal representatives. Sealed with our seals, and dated this day of _____, 187 .

¹ 9 John. 364.

² 3 Hill, 323.

Whereas, the said hath commenced an action against the said before , Esq., a Justice of the Peace of the county of , for the recovery of a demand of two hundred dollars or less, as alleged by him, in which action the said defendant has desired an adjournment of the said cause :

Now, therefore, the condition of this obligation is such, that if no part of the property of the said defendant; liable to be taken on execution, shall be removed, secreted, assigned, or in any way disposed of, (except for the necessary support of himself and family,) until the said demand of the said plaintiff shall be satisfied, or until the expiration of ten days after the said plaintiff shall be entitled to have an execution issued on the judgment in the said cause, then this obligation to be void and of no effect; otherwise to remain in full force and virtue.

Sealed and delivered in the presence of

[L. S.]
[L. S.]

Pleading on Adjourned Day.

It sometimes happens the defendant neglects to appear and plead on the return day of the process, and afterwards appears and asks to plead on the adjourned day.

It appears by the authorities cited, that it is left to the sound discretion of the Justice whether he will allow him then to answer; yet, as a general thing it would be more safe to allow the defendant to *answer* upon such terms as he shall deem proper, which usually would be about the same as upon allowing amendments, when he can discover good faith on his part and merits in his application, than to shut him out of making his defence, and thus do him an essential injury. *Some excuse*, however, should be shown for his neglect to appear on the return day.

Though a Justice has a right to permit a defendant who has omitted to appear on the return day of the summons, to plead on a day to which the cause has been adjourned, upon a proper excuse for the default being shown ; still it being a matter of discretion, error will not lie where the application has been refused, though the County Court should

be of opinion that the application ought to have been granted.¹

Second Adjournment.

In all cases a defendant shall also be entitled to a further adjournment, upon giving security, if required, as is directed in the next succeeding section, and upon proving, by his own oath or otherwise, to the satisfaction of the Justice, that he cannot safely proceed to trial for want of some material testimony or witness, and that he has used due diligence to obtain such testimony or witness.²

But if any bond shall have been given upon a prior adjournment, it shall not be necessary to execute a new bond upon a subsequent adjournment, *unless such bond* be required by the Justice, or by the bail of such defendant in such prior bond.³

No adjournment shall be allowed, without the agreement of the parties, to a time *beyond ninety days* from the joining of issue in the suit.⁴

The Justice must be satisfied with the proof, and therefore while he should be cautious not to compel the defendant to go to trial until he has had a fair opportunity for preparation, he should reject an application, where he is satisfied from the facts disclosed, the defendant has not used ordinary diligence to procure his witnesses, or that his object is delay.

It is not enough, on this application for a further adjournment, that the defendant's testimony or witness is absent. He must also prove that he has used due diligence to obtain the absent testimony or witness, and has been unable to do so. And even though the first adjournment was granted on the application of the plaintiff, or on the Justices' own motion, still, unless the defendant shows due diligence, the Justice may refuse a second adjournment on his application.⁵ The reasoning of the Court in *Powers vs. Lockwood*,⁶ seems to apply as well to the case of an adjournment at the plain-

¹ 4 Denio, 576; 12 Wend. 150; 21 Id. 454.

³ Id. sec. 76.

⁴ Id. sec. 78.

² 2 R. S. 170, sec. 75.

⁵ 9 John. 364

⁶ Id. 183.

tiff's as the defendant's request, though that was a case where the defendant had applied for the first adjournment. "There must," says the Court, "be some reasonable limitation to the time of the application, and of which the Court is to judge. After one adjournment, at the request of the defendant, to enable him to prepare for trial, it would be vexatious to allow him another on the usual affidavit, and without showing any diligence in the meantime. The first adjournment applied for by the defendant; was for time to prepare for trial, and was a substitute for an adjournment on affidavit and security. Both the witnesses, whose names were given by the defendant, lived within four miles of the Court. The defendant is always entitled, as of right, to one adjournment, to procure testimony on making the requisite oath; but if he neglect to take out subpoenas, or make any effort to procure his witnesses after issue joined, and after an adjournment on his own motion, he ought not, in reason and justice, to be entitled to a farther adjournment, without some special cause shown for the non-attendance of his witnesses, or for the adjournment. On the adjourned day after issue joined, the plaintiff is supposed to appear with his proof, and the jury to appear on the *venire*, and it would be an abuse for a defendant to be entitled, as of course, to another adjournment to procure his testimony, without having taken any one step towards it in the meantime, or shown any one reason why he has omitted to do it. The statute could not have intended to help a party in his wilful negligence." On the other hand, where the defendant shows that he has subpoenaed a material witness, who does not attend, and that without such testimony he cannot safely proceed to trial, or any other reasonable excuse for not being ready, the Justice is bound to grant the adjournment, and if refused, it is an error for which the judgment will be reversed.¹

The Supreme Court have recently decided, that when a defendant's conduct, on applying for a second adjournment before a Justice, is such as to cast suspicion upon the *bona fides* of the application, and he refuses to state either on oath

¹ 11 John. 442; 9 Id. 364; 13 Id. 462.

or otherwise, what he expects to prove by his *absent witnesses*, the Justice may refuse the adjournment.¹

Justices have a discretion to exercise, in granting and refusing adjournments, and nothing short of a clear abuse of that discretion will be regarded as ground for interfering on certiorari.²

On application for a second adjournment, the defendant should show that he expects to procure the witness on the adjourned day.³

An adjournment may always be granted, without restrictions as to time, by the agreement of the parties ; and in such case, if the suit be commenced by warrant, the defendant must be discharged from custody.⁴

An agreement between the parties to adjourn a given time, and that then, if a certain witness do not attend, the Justice may adjourn a reasonable time to procure the attendance of a witness, is a *binding agreement*, which neither of the parties can revoke without the consent of the other.⁵

If such an agreement does not provide that security shall be given, the Justice may adjourn without security, this being waived by the silence of the parties.⁶

The Justice should, in all these cases, make a minute of the agreement in his minutes of the cause.

In *Smith vs. Fenton*, (2 Cowen's Rep. 425,) on certiorari to a Justices' Court, it appeared that Fenton sued Smith in the court below, and after issue joined, the cause was twice adjourned by consent. The second adjournment was under a stipulation of the defendant, that he would not delay the trial further, but would absolutely come to trial on the 17th January, 1823, the last adjourned day. On that day the parties appeared, and the defendant requested a further adjournment, offered security, and to make oath of the absence of two material witnesses who had been subpoenaed by him, but had not attended ; that without their testimony he could not proceed to trial, as he was advised by counsel ; that one of them had gone a journey ; and that he expected to pro-

1 3 Hill, 323, Nelson Ch. J.

2 3 Hill, 323, Nelson Ch. J.

3 Id.

4 2 R. S. 170, sec. 72.

5 1 Cow. R. 255.

6 Id.

cure their attendance in two or three weeks. The Justice denied the adjournment.

Judgment for the plaintiff before the Justice.

BY THE COURT.—The spirit of the \$25 act, and the adjudications of this Court upon it, appear to be, that the Justice has a discretion in granting adjournments after the first. One adjournment the defendant may claim as a matter of right, on giving security and making oath of the absence of a material witness. Others he may be entitled to on showing sufficient cause; provided the three months have not expired. In this case the first two adjournments were by consent; and though the defendant may have been guilty of a violation of good faith, yet he offered to comply with the requisitions of the act. There had been no laches on his part; for he had subpœnaed his witnesses, and they did not attend. We think the Justice ought to have granted the adjournment, though he seems to have acted under the impression that the defendant's object was delay and vexation. Judgment reversed. (See also 9 Johns. Rep. 133, 364; 11 Johns. Rep. 442; 12 Johns. Rep. 418; 13 Johns. Rep. 462; 15 Johns. Rep. 432.)

Where a cause before a Justice of the Peace is held open to a particular hour on a subsequent day, the Justice should, in analogy to the time given on adjournments, wait an hour after the time specified for the parties to appear. And it is *erroneous* for him to call the cause in the absence of one of the parties, and proceed to the hearing thereof, before the expiration of that time.¹

Adjournments may also be made, from necessity, in certain cases not provided for in the above sections. As when an attachment is issued against a witness pursuant to section 83, or a new venire is issued pursuant to sections 102 and 111, the Justice may, without doubt, adjourn the cause to such time as will be reasonable for the return of the venire or attachment; or he may continue the cause open until the attachment or venire is returnable, even until the next day. A Justice may continue his court from one day to the next,

¹ Clark vs. Garrison, 3 Barbour, 372, Hand, J.; 20 John. 309.

when the exigencies of the case require it. (2 Caines' Rep. 137, Day vs. Wilber.) And the above are cases in which it may be proper so to continue it. A provision is also contained in section 281 of the Justices' Act for adjourning a cause where a material witness refuses to testify, &c., and is committed to jail, pursuant to sections 279 and 280.

II. Of Irregular Adjournments, and the Effect Thereof.

An adjournment of a cause not authorized by the statute, would be a discontinuance of the suit. (2 Johns. Rep. 192; 4 Johns. Rep. 117; 8 Johns. Rep. 391.)

But the party, upon whose application an erroneous adjournment is made, cannot object to it. (3 Caines' Rep. 166.)

So if the party having the right to object to the erroneous adjournment, appear at the adjourned day, and go to trial on the merits, it would be a waiver of the irregularity. (9 Johns. Rep. 136.)

In *Dunham vs. Heyden*, (7 Johns. Rep. 381,) an improper adjournment was granted on the application of the plaintiff. On the adjourned day, the parties being called, the plaintiff answered; but the defendant though present, refused to answer or proceed in the cause. A witness was then sworn and examined on the part of the plaintiff, and was cross-examined by the defendant. The Supreme Court held that this cured the irregularity of the adjournment.

So if the defendant should do any other act, treating the cause as still in existence, as applying for a further adjournment, a venire, &c., or taking out a subpoena, it would probably be a waiver of the irregularity.

In *Kimball vs. Mack*, (10 Wend. Rep. 497,) Kimball sued Mack before a Justice, and on the return of the summons issue was joined, and the cause adjourned to the 26th of December, at 1 P. M., at the Justice's office. On that day the Justice was from home, and did not return to his office until 3 P. M., when he found Mack in a dwelling house adjoining his office, who told him that he and Kimball had agreed to adjourn the cause until the 10th day of January, at 2 P. M., and the same communication was made to the

Justice by another person, on behalf of Kimball, whereupon the Justice entered an adjournment on his docket until the 10th of January ; on which day, at 3 P. M., he called the cause ; the defendant did not appear ; the Justice proceeded to hear proof on the part of the plaintiff, and rendered judgment in his favor, which was reversed.

If a Justice illegally adjourn a cause, it amounts to a discontinuance of the suit.¹

Though, after an irregular adjournment granted by a Justice, at the plaintiff's request, the defendant appear at the adjourned day, and answer to his name, but decline to take any part in the further proceedings, this will not *amount* to a waiver of the irregularity.² Otherwise, however, if the defendant participate in the further proceedings, by pleading, asking an adjournment, or the like.³

The Justice, after the parties had pleaded, adjourned the cause to the 20th of May, and then left his office.

On returning a short time afterwards, he found lying on his desk a written consent that the cause should stand adjourned to the 18th of May, and there was added a request that a Justice should note the fact. The paper was signed by the counsel for the respective parties.

The Justice, therefore, adjourned the cause to the 18th of May. This second adjournment made, as it would seem, in the absence of the parties and their attorneys, was clearly void.

The irregularity, however, might have been waived, and a subsequent trial, by the consent of the parties, would then have been as valid as if they had joined issue without process.⁴

The above authorities are sufficient to show in what cases the Justice ought to adjourn the case. A party should not be compelled to go to trial until he has had an opportunity to prepare for trial. When the Justice can fairly discover that such an opportunity has been given, he should then allow the other party to proceed and dispose of the cause.

¹ 8 John. 391.

² 5 Hill, 428, Bronson J.

³ Id.; 9 John. 186.

⁴ 18 Barb. 530.

Some persons think that a party is bound to wait until they can get their business disposed of, or until it suits their convenience. This is a mistake, and the Justice must, in all cases, require diligence in parties in preparing for trial.

CHAPTER VIII.

Of Proceedings After Issue Joined.

The next step to be taken in the cause is for the parties to prepare for the trial.

Parties may have their witnesses in readiness for trial, at the return day of process, although it is not always advisable, because until issue is joined, the points to be contested are not known to the parties, and neither party can tell what testimony or witnesses he may need.

The process of subpoena is given to a party to enable him to *compel* the attendance of his witnesses at the trial, but there can be no absolute necessity for using such process when witnesses will voluntarily attend without it.

As matter of prudence, parties should subpoena their witnesses, but it cannot be material to the adverse party whether the witnesses opposed to him attend, in obedience to a subpoena or by agreement.

Witnesses are entitled to their fees from the party at whose instance they attend, whether they are subpoenaed or not.

The non-service of a subpoena would be no defence for the party when sued by a witness for his fees, who had attended as his witness at his request. Nor is it possible to perceive how the want of a subpoena can relieve the unsuccessful party from the payment of the fees of his adversary's witnesses. There is nothing in the statute that countenances such a proposition.¹

Any Justice of the Peace may issue subpoenas, to compel the attendance of witnesses, to give evidence on any trial depending before himself, or any other Justice. Such subpoena shall be valid, to compel the attendance of a witness, being in the same county where the cause is to be tried, or being in an adjoining county, and in no other case.²

¹ 12 Howard Pr. 446; 4 Denio, 76. ² 2 R. S. 171, sec. 80.

A Justice shall not issue any subpœna, to compel the attendance of witnesses before another Justice in any suit, unless the person applying, shall prove, by his own oath, or the oath of some other person, that such suit is actually depending before such other Justice.¹

A subpœna may be served, either by a constable, or by any other person, and it shall be served by reading the same or stating the contents thereof to the witness, and by paying or tendering the fees allowed by law for one day's attendance.²

Form of Subpœna.

— OF — }
ONEIDA COUNTY, } ss.

To

Greeting :

In the name of the People of the State of New York, you are commanded to appear before me, the undersigned Justice of the Peace, at my office in the aforesaid, on the day of 187 , at o'clock in the noon, to give evidence in an action now pending before me, between plaintiff and defendant , on the part of

Witness my hand, at the of aforesaid, the day of 187 .

Justice of the Peace.

If the party desire the witness to produce some writing, or document in his *possession*, the Justice may insert after the words, defendant, [or as the case may be,] the following :

“ And you are further required to bring with you,” [here insert the description of the writing or papers to be produced, and proved in evidence on said trial.]

A general clause, to produce all letters, papers and documents touching or concerning the matter in dispute would be too indefinite and insufficient. The papers should be described.³

It is provided by statute, that whenever it shall appear to the satisfaction of the Justice, by proof made before him,

¹ 2 R, S. 171, sec. 81.

³ Ry. & Moody, N. P. cases, 341.

² Id. sec. 82.

(which proof may be by the affidavit of the party to the suit, who makes the application, or by other competent testimony,) that any person duly subpoenaed to appear before him in any cause, shall have refused or neglected, without just cause to attend as a witness, in conformity to the subpoena; and the party in whose behalf such witness shall have been subpoenaed, shall make oath that the testimony of such witness is material, the Justice shall have power to issue an attachment to compel the attendance of such witness.¹ The necessary proof of service and refusal, or neglect to appear, must be by the affidavit of the party applying or by other competent testimony. Where the witness has been subpoenaed by the party, and the latter seeks, by his own oath, to lay the foundation of a case for the issuing of an attachment, he may do so orally or by affidavit.² If the service is made by a constable, his return is evidence of that fact; if made by a third person, who is neither constable nor party, the Justice may satisfy himself of the fact of service having been made, by administering an oath and receiving the oath by parol. But in either of these cases, the language of the statute requires that the proof of non-attendance and materiality should be made. An affidavit is the safer course, and should generally be adopted, to avoid any controversy in regard to the validity of the attachment.

Every such attachment shall be executed in the same manner as a warrant, and the fees of the officers for issuing and serving the same, shall be paid by the person against whom the same shall have been issued, unless he shall show reasonable cause, to the satisfaction of the Justice, for his omission to attend; in which case the party requiring such attachment shall pay all costs of such attachment, and the service of the same.³

Form of Affidavit for Attachment against a Witness who Neglects to Attend.

ONEIDA COUNTY, ss.—John Stiles, the plaintiff named in

¹ 2 R. S. 241, sec. 83, as amended; ² 12 Barb. 529.

[4th ed. p. 439. sec. 73.]

³ 2 R. S. 171, sec. 84.

the annexed subpcœna, [or if some other person makes the affidavit, say A. B., agent or attorney for plaintiff,] being duly sworn, says that he did on the 14th day of August instant, at the town of Paris, in said county, serve the annexed subpcœna on A. B., a witness therein named, by reading the same [or stating the contents thereof,] to him, at the same time paying [or tendering] to him the sum of twenty-five cents. And this deponent further says that the testimony of the said A. B. is material to this deponent, [or as the case may be,] on the trial of the cause above mentioned in said subpcœna; and further, that the said A. B. has neglected to attend the trial of the said cause, as he was therein commanded.

JOHN STILES.

Subscribed and sworn this 10th day }
of August, 18 , before me, }

Justice.

If a third person serve the subpcœna, then the Justice may administer the following oath :

“ You swear that you will true answers make to all such questions as shall be put to you touching the service of the subpcœna in a cause now pending before me, between John Stiles, plaintiff, and James Roe, defendant. so help you God.”

Or if served by a constable, his return may be endorsed as follows :

“ The within subpcœna personally served on A. B., a witness therein named, on the 14th day of August, 18 , his fees paid. Const. fees 12½ cents. Constable.”

The above forms are all that can be required in the proceeding for an attachment.

If the service is proved by a third person, then the affidavit of the plaintiff, or his agent, need only state that the witness is *material*.

Form of Attachment.

ONEIDA COUNTY, ss.—The people of the State of New York, to any constable of the said county, greeting :

We command you to attach A. B., and bring him before me, the undersigned, a Justice of the Peace in and for the said county, at my office in the town of , forthwith, [or

at such time as the case may be adjourned,] to testify in an action now pending before me between , plaintiff, and , defendant, on the part of the plaintiff; and also to answer all such matters as shall be objected against him, for having neglected to attend the trial of said cause as a witness, in conformity to a subpoena duly served upon him for that purpose; and have you then and there this precept.

Given under my hand at aforesaid, this 14th day of August, 18 . Justice."

Of Imposing a Fine upon the Witness for Non-Attendance, or Refusing to Testify.

In addition to the power of compelling the attendance of witnesses by process of attachment, it is provided by statute that every person duly subpoenaed as a witness, who shall not appear, or appearing shall refuse to testify, shall forfeit, for the use of the poor of the town, for every such non-appearance or refusal, (unless some reasonable cause or excuse shall be shown on his oath, or the oath of some other person,) such fine, not less than sixty-two cents, nor more than ten dollars, as the Justice before whom prosecution therefor shall be had, shall think reasonable to impose.¹ The witness is not only liable to a fine for his non-attendance or refusal to testify, but he is also liable to the party in whose behalf he was subpoenaed, for all damages which such party may sustain, by reason of such non-appearance or refusal.² If he be present and have an opportunity of being heard before the Justice, the fine may be imposed without the issuing of process.³ The Justice should, in such a case, call upon the witness to show cause why a fine should not be imposed; and if no sufficient cause be shown, impose a fine forthwith, on proof that the subpoena has been served. But if the witness be absent, or if the proceeding be instituted before a Justice other than the one before whom the suit in which the penalty was incurred was depending, a summons must be

¹ 2 R. S. 24, sec. 85; [4th ed. p. 439.] ³ 2 R. S. 241, sec. 85; [4th ed. p. 440.]
² Id. 172, sec. 90. See 10 John. 248.

issued against the defaulting witness, which may be in the following form :

ONEIDA COUNTY, ss.—The people of the State of New York, to any constable of said county, greeting :

We command you to summon John Doe, to appear before the subscriber, a Justice of the Peace in and for said county, at his office in the town of _____, in said county, on the day of May inst., at one o'clock in the afternoon, to show cause why he should not be fined, according to law, for his non-attendance as a witness before the said Justice, [or before _____, Esq., a Justice of the Peace in and for the said county,] at his _____ in the said town, on the _____ day of _____ inst., to give evidence in a certain cause then depending before the said Justice, [or before the said _____, Esq., such Justice as aforesaid,] in which James Jackson was plaintiff, and Richard Roe, defendant, on the part of the plaintiff, [or defendant,] and have you then there this precept. Given under the hand of the said Justice, this 10th day of _____, 18 ____ . _____ Justice.

No form for the foregoing summons is prescribed by the statute, nor does the statute contain any provisions regulating the time within which it should be made returnable or served. In the absence of any such provision, as it may be considered in the nature of a notice to show cause, rather than a process in a suit, a reasonable time should intervene between the date and return, and it should be served a sufficient time before the day of appearance for the witness to attend. The service should be personal, by reading or stating the contents of the summons, and the constable's return of service would be sufficient to authorize the Justice to proceed. Unless the witness appear at the time and place at which the summons is made returnable, and admit due service of the subpoena, the Justice should require proof of the service and of the non-attendance of the witness, which proof may be made by oral testimony.

The Justice imposing any fine, shall make up and enter in his docket a minute of the conviction, and of the cause

thereof, and the same shall be deemed a judgment in all respects, at the suit of the overseers of the poor of the town.¹

Form of Conviction of Defaulting Witness.

ONEIDA COUNTY, ss.—Be it remembered that on the day of , 18 , A. B. was convicted before me, and fined the sum of five dollars, besides one dollar and six cents costs, for non-attendance as a witness, to give evidence before me, at my office in the town of , on the day of , instant, [or as the case may be,] in a certain cause then and there depending before me, in which John Styles was plaintiff, and James Doe was defendant.

Justice.

Upon the imposition of the fine, and default of payment, the Justice is forthwith to issue an execution, the form of which is prescribed by statute.²

Form of Execution for Fine for Costs against a Defaulting Witness.

ONEIDA COUNTY, ss.—The people of the State of New York, to any constable of said county, greeting :

Whereas, A. B. was, on the day of instant, convicted and fined by the undersigned, a Justice of the Peace in and for said county, the sum of five dollars, besides one dollar and six cents costs, for non-attendance as a witness to give evidence before the said Justice, at his office in the town of , in said county, on the 14th inst., in a certain cause then and there depending before the said Justice, in which was plaintiff, and defendant, a record of which conviction, and the cause thereof has been duly made up and entered in the docket of the undersigned ; and whereas the said A. B. has neglected to pay the said fine and costs.

You are hereby commanded to levy the said fine and costs of the goods and chattels of the said A. B., and for the want thereof, to take and convey the said A. B. to the jail of the said county, there to remain until he shall pay such fine and costs ; and the keeper thereof is required to keep

¹ 2 R. S. 172, sec 87

² Sec. 88.

the said A. B. in close custody in said jail, until the fine and costs aforesaid be paid, or until thirty days after the commencement of his imprisonment. Given under my hand, at the town of aforesaid, the 14th day of May, 18 .¹
Justice.

Although no mode of selling the property is pointed out by the statute, yet doubtless, the officer should sell in the same manner as upon execution in ordinary cases.

When the money is collected on such execution, the constable shall return the same to the Justice, and such Justice shall pay over the amount of the fine imposed to the overseers of the poor of the town for the use of the poor.²

Every person subpœnaed as aforesaid, and neglecting or refusing to appear or testify, shall *also* be liable to the party in whose behalf he shall have been subpœnaed, for all damages which such party shall sustain, by reason of such non-appearance or refusal.³

Witnesses may be procured to testify who are in prison; but as they are brought before the Court upon a writ of *habeas corpus*, counsel must necessarily be consulted. It is therefore deemed unnecessary to give a further account of the proceedings in such cases.

An action may be maintained against a defaulting witness for the penalty and the damages sustained by the plaintiff, though a jury was not sworn in the cause in which the witness was subpœnaed. But to enable the plaintiff to recover the costs of the circuit it must appear that the failure to try the cause was on account of the absence of the witness. The action will not lie unless the witness has been paid his fees for travel* and one day's attendance; nor, though the proper amount was paid in the first instance, if the witness left court after default in payment for further attendance, although he had not applied to the party for such payment. And where less than the legal amount was paid when he was subpœnaed, and it did not appear that he objected to the amount, and he actually attended pursuant to the sub-

¹ 2 R. S. 172, sec. 88.

³ Id. sec. 90.

² Id. sec. 89.

* The fees for travel has reference to Courts of Record.

pœna, but left court before the cause was tried. *Held*, notwithstanding that the non-payment of the full amount was a fatal objection to a recovery.

A witness attending court is not obliged to be sworn until his fees as such witness have been paid. If the witness had expressly *waived* the payment of his fees, it seems that the action might have been maintained, so if he had agreed to attend on being paid his board and traveling expenses.¹

In an action for the penalty given by 2 R. S. 400, § 43, to the aggrieved party, against a witness for not attending court pursuant to a subpoena, it must appear to enable the plaintiff to recover that the witness was material, and that damages resulted from his non-attendance. *Accordingly*, when the defendant in such an action offered to show that the plaintiff had admitted that the defendant knew nothing about the matters in controversy in the suit in which he was subpoenaed. *Held*, that the evidence was admissible.

A party who causes a witness to be subpoenaed, who is known to him not to be material, for the purpose of annoyance, is guilty of contempt of the court whose process is used. The omission to pay the witness his fees is a reasonable excuse for non-attendance, which will protect him from liability for the penalty.²

Of the Commission to Examine Foreign Witnesses.

It is now provided by statute, as follows :

“ Whenever an issue of fact shall have been joined in any action or suit before a Justice of the Peace, and it shall appear on the application of either party, that any witness not residing within the county where said suit is pending, or the county adjoining, is material in the prosecution or defence of such action or suit, the said Justice may award a commission to one or more competent persons authorizing them, or any one of them, to examine such witness, on oath, upon the interrogatories settled by the said Justice, and certified by his approbation entered or endorsed thereon, or by the written agreement or assent of the parties, annexed to such

¹ Hurd vs. Swan, 4 Denio R. 75.

² Courtney vs. Baker, 3 Denio, 27 Beardsley J.

commission, to take and certify the depositions of such witness, and to return the same, according to the direction given with such commission, in which commission both parties may unite.¹

“Such commission may be granted at the instance of either party by such Justice of the Peace, *at any time*, upon proof that due notice of such application for such commission has been served on the adverse party, at least six days before the time of making such application ; but the issuing of such commission shall not postpone the trial beyond the time now authorized by law.²

“And whenever the defendant shall neglect to appear, or to plead in such action or suit, and the plaintiff shall make application for a commission to take the deposition of a material witness for the prosecution of such action or suit, the Justice may award a commission without notice, to one or more competent persons to examine such witness on oath, upon interrogatories proposed by the plaintiff, and settled by the Justice, to take and certify the deposition of such witness, and to return the same according to the direction given in such commission.³

“The commission shall be executed and returned as is prescribed by statute when a commission issues out of a court of record ; and the deposition and testimony taken in pursuance thereof shall be received on the trial as testimony in the cause, with the like effect as if such witness were personally examined at such trial.”⁴

The commission may be granted at any time, upon giving six days notice by either party, after an issue of fact is joined in the cause.

It is further provided by the statute, as follows :

“When a commission shall be applied for and granted on the part of the plaintiff, pursuant to the act passed April 18th, 1838, the plaintiff shall be allowed the same time and privileges of adjournment, to which the defendant is now entitled by law.⁵

¹ Sess. Laws, 1838, p. 232, sec. 2.

⁴ Laws 1838, sec. 4.

² Id. sec. 3.

⁵ Sess. Laws 1841, p. 112, sec. 1.

³ Sess. Laws 1847, p 437, sec. 1.

“When the commission is executed in this State, the commissioners shall have the same power to issue subpoenas, swear witnesses, and compel their attendance, as Justices of the Peace have.¹

“In case of a commission for either party, the following fees and disbursements shall be allowed by the Justice, in addition to the costs now allowed by law, although the whole may exceed five dollars, viz :²

“To the Justice, for every order for a commission to examine witnesses attending, settling and certifying interrogatories to be annexed to a commission, fifty cents.

“To one or more commissioners, for taking and retaining testimony, in the whole, ten cents per folio.

“For making the necessary return and certificate thereto, one dollar.

“For every subpoena or oath, ten cents.

“For serving subpoenas, and attendance of witnesses before such commissioners, the same fees as are now allowed by law in Justices’ Courts.”

And it appears by the statute that either party may adjourn the cause for the purpose of having the commission executed and returned, subject, however, to the same restrictions as govern in other cases ; such as showing the materiality of the testimony, giving security on the part of the defendant, if required, for the adjournment, &c.

The Justice should be satisfied that the commission is not asked for, for the purpose of delay ; and when he discovers that it is, and that the testimony is not material, he may refuse the application.

Form of Notice of Application for a Commission.

IN JUSTICES’ COURT—Before _____, Justice.

JOHN STILES, }
vs. }
JAMES DOE. }

SIR—Take notice, that an application will be made to _____, Esq., the Justice before whom this cause is pending, at his office in the city of Utica, on the 20th day of August instant, at 9 A. M., for a commission, to be directed to Amos

² Sess. Laws 1841, p. 112, sec. 2.

³ Id. sec. 3.

Coe, of the city of Buffalo, to examine John Day, of the same place, a witness in this cause, upon interrogatories to be annexed to such commission.

Dated Utica, August 14, 18 .

J. S., Plaintiff.

To JAMES DOE, Defendant.

If the application is made in behalf of a defendant, the notice, &c., may be varied to meet the facts.

At the time and place mentioned in the notice, the Justice should require proof of service of the notice in due time, unless the opposite party *admit* due notice; and the Justice must require of the applicant to state under oath where the witness resides, and the facts to show his materiality; and should the opposite party *admit* the facts stated, or should the facts as stated be wholly immaterial to the issue, the Justice should refuse the application.

If the party applying makes out a proper case for a commission, it should be immediately granted, and the interrogatories at once settled by the Justice, unless the parties otherwise agree.

Form of Commission to Examine Witness.

ONEIDA COUNTY, ss: To Amos Coe, Esq., of the city of Buffalo:

Whereas, it appears to me, the undersigned, a Justice of the Peace of the city [or town] of Utica, in the said county of Oneida, that John Day, of the said city, is a material witness in a cause now pending before me, between John Stiles, plaintiff, and James Doe, defendant. Now, therefore, in confidence of your prudence and fidelity, and in pursuance of the statute in such case made and provided, I have appointed you, and by these presents do appoint you commissioner to examine the said witness, and do therefore authorize you, at certain days and places, to be by you for that purpose appointed, diligently to examine the said witness on the interrogatories hereunto annexed, on oath, to be taken before you, and to cause such examination to be reduced to writing and signed by such witness and yourself, and then return the same, annexed hereto, to me, enclosed under your

seal. Given under my hand at the city of Utica, the 14th day of August, 18 . A. B., Justice.

The Justice must direct on the commission the manner in which it shall be returned to him.¹

It may be in the following form, thus :

"I direct that the within commission be returned to me by mail. Dated August 24, 18 .

A. B., Justice of the Peace."

Form of Interrogatories and Cross-Interrogatories to be Annexed to the Commission.

Interrogatories to be administered to John Day, a witness to be produced, sworn and examined on the part of the plaintiff mentioned in the annexed commission.

First : Do you know the parties, plaintiff and defendant, named in the annexed commission, or either of them ? and how long have you known them, or either of them ?

Second : Are you acquainted with the hand writing of the defendant ?

Third : Do you know [according to the facts] ?

Lastly : Do you know any other matter or thing touching the matters in question, that may tend to the benefit or advantage of the plaintiff ? If yea, declare fully and at large, as if you had been particularly interrogated thereto.

Cross Interrogatories.

"Interrogatories to be administered to the said John Day, by way of cross-examination."

[The interrogatories are, of course, varied to suit each case.]

If the interrogatories on each side are agreed upon by the parties, they may without having them settled by the Justice, signify this fact by a written agreement or assent to be annexed to the commission. This agreement may be in the following form :

Form of Assent to be Annexed to the Commission.

The undersigned, the parties to the suit named in the

annexed commission and interrogatories, hereby agree that the interrogatories hereto annexed, may be propounded to the witness therein named, by the commissioner to whom the annexed commission is directed.

JOHN TRACY,
ASA MARBLE.

If the parties cannot agree to the interrogatories, they are to go before the Justice at the time appointed and have them settled by him. This being done, the Justice indorses thereon his approval in the following form :

Form of Approval of Interrogatories by the Justice.

The within interrogatories on the part of the plaintiff, and the cross interrogatories on the part of the defendant, are hereby approved by me. Utica, August 14, 18 .

A. B., Justice.

The commission being ready, should be enclosed in a wrapper, directed to the commissioner at his place of residence, and deposited in the post office, and the postage paid. The parties, however, may waive all this form, if they agree upon any other mode of conveyance, &c.

It is necessary, (unless the parties otherwise agree) that the commission be executed and returned, as is prescribed by statute when a commission issues out of a Court of Record, as we have before seen.

The provisions of the statute referred to, directing the manner in which a commission issuing out of a Court of Record shall be executed and returned, are (2 Rev. Stat. new ed. p. 315, § 24.) “ The persons to whom such commission shall be directed, or any one of them, unless otherwise expressly directed therein, shall execute the same as follows :

1. They, or any one of them, shall publicly administer an oath to the witnesses named in the commission, that the answers given by such witnesses to the interrogatories proposed to them, shall be the truth, the whole truth, and nothing but the truth :

2. They shall cause the examination of each witness to be reduced to writing, and to be subscribed by him and certi-

fied by such of the commissioners as are present at the taking of the same :

3. If any exhibits are produced and proved before them, they shall be annexed to the depositions to which they relate, and shall in like manner be subscribed by the witnesses proving the same, and shall be certified by the commissioners :

4. The commissioners shall subscribe their names to each sheet of the deposition taken by them ; they shall annex all the depositions and exhibits to the commission, upon which their return shall be indorsed ; and they shall close them up under their seals, and shall address the same, when so closed, to the clerk of the Court from which the commission issued, or to the clerk of the county in which the venue shall be laid, as shall have been directed on the commission, at his place of residence :

5. If there is a direction on the commission to return the same by mail, they shall immediately deposit the packet so directed in the nearest post office :

6. If there be a direction on the commission to return the same by an agent of the party who sued out the same, the packet so directed shall be delivered to such agent.

A copy of this section shall be annexed to every commission authorized by this article.

So much of the preceding section as directs the commission to be returned to the clerk of the Court, or of the county, is inapplicable to proceedings in a Justices' Court ; in which case the commission should be returned directly to the Justice. And the latter clause of the section, requiring a copy of the same to be annexed to the commission, seems not *necessarily* to apply to the act of 1838 ; as that act only refers to the foregoing section for directions as to the manner of executing and returning the commission. For the instruction of the commissioners, however, it would probably be well in most cases to annex a copy of the foregoing section, as in cases of a commission issued from a Court of Record.

Form of Commissioner's Summons to a Witness.

ERIE COUNTY, ss.—Whereas, the undersigned has received

a commission issued by , Esq., a Justice of the Peace of the county of Oneida, directed for the examination of John Day, a witness in a case depending before the said Justice, between John Stiles, plaintiff, and James Doe, defendant; you, the said John Day, are therefore required to be and appear before me, the said commissioner, at my dwelling house, on, &c., then and there to be examined, and to testify the truth, according to the best of your knowledge, for and on behalf of the said plaintiff, [or defendant,] and herein you are not to fail. Dated Buffalo, August 21, 18 .

AMOS COE.

Form of Oath to Witness by Commissioner.

You do swear that the answers to be given by you, to the interrogatories to be proposed to you by me, the commissioner to execute a commission directed to me, issued by , Esq., a Justice of the Peace of the county of Oneida, in a cause depending before him, between John Stiles, plaintiff, and James Doe, defendant, shall be the truth, the whole truth, and nothing but the truth, so help you God.

Form of Caption of Deposition.

Deposition of John Day, a witness produced, sworn and examined on oath, on the 21st day of August, 18 , at, &c., by virtue of a commission issued by , Esq., a Justice of the Peace of the county of Oneida, to me, Amos Coe, directed, for the examination of the said John Day, a witness in a cause depending before the said Justice, between John Stiles, plaintiff, and James Doe, defendant.

The said John Day deposes as follows :

To the first interrogatory this deponent says, &c.

To the second, &c.

JOHN DAY.

Subscribed and sworn this day }
of August, 18 , before me,

AMOS COE, Commissioner.

The commissioner who takes the deposition must make return on the commission, or it cannot be read in evidence.¹

The return may be in the following form :

ERIE COUNTY, SS.—I hereby certify that in pursuance of *the within commission*, I have examined the said John Day, by administering to him the oath publicly, and examining him on the interrogatories annexed, and reduced the same to writing, which examination is hereto annexed, signed by him, and returned as required by said commission.

Dated September 1, 18 .

AMOS COE, Commissioner.

Justices of the Peace who conduct the proceedings in relation to the issuing and return of commissions under these statutes, should be very careful and see that they comply strictly with the statutes, or the depositions cannot be read in evidence.

A Justice of the Peace, on issuing a commission to examine a witness, must direct the *manner in which it shall be returned*; and if he omit to do so, the depositions cannot be read in evidence.

Statutes which innovate upon the common law rules of evidence, must be strictly pursued.

In the case of *Smith vs. Randall*, (3 Hill R. 495,) Justice Bronson, in delivering the opinion of the Court, says: "The act of 1838 gives the Justice authority to issue a commission to one or more competent persons, to take and certify the depositions of witnesses, and to return the same, according to the direction given with such commission." (Statute, 1838.) The commission shall be executed and returned as is prescribed by statute where a commission issues out of a Court of Record, and the deposition and testimony taken in pursuance thereof shall be received on the trial. (§ 4.) The interrogatories are to be settled by the Justice, and certified by his approbation endorsed thereon. (§ 2.) The authority to issue the commission is substantially the same as that which is given to Courts of Record. (2 R. S. 393, § 11.) When a commission issues out of a Court of Record, the officer who settles the interrogatories directs upon the commission, the manner in which it shall be returned, which may be by an agent, or through the post office, and the commissioner must return it in such manner as shall have been

directed on the commission. (§ 15, 16.) In this case the Justice settled the interrogatories, but he gave no direction as to the mode of returning the commission. This is a fatal objection. Statutes which innovate upon the common law rules of evidence, must be strictly pursued. The mode of returning the commission is highly important for the purpose of guarding against frauds, and no substantial requirement of the statute can be dispensed with. The case of *Jackson vs. Hobby*, (20 John. 357,) is decisive upon this point. In *Williams vs. Eldridge*, (1 Hill, 249,) the interrogatories were not settled by a Judge, and the manner of returning the commission was agreed upon by stipulation of the parties.

In the case of *Fleming vs. Hollenback*, (7 Barbour Rep. 271,) Justice Mason, who delivered the opinion of the Court at page 274, says: There is however another perfect answer to this branch of the case. The defendant's counsel objected to the admission of these depositions, for the reason that the statute had not been complied with in their execution, and I am satisfied that this objection was well taken, and that these depositions should have been excluded.

The statute requires that the commissioners shall annex all the depositions and exhibits to the commission *upon which their return shall be indorsed*. (2 R. S. 394, § 24, sub. 4.) This the commissioners have not done in this case. Statutes which innovate upon the common law rules of evidence, must be strictly complied with. (*Jackson vs. Hobby*, 2 John. 357 ; *Chappel vs. Brockway*, 21 Wend. 157 ; *Smith vs. Randall*, 3 Hill R. 495.) The mode of executing a commission is highly important, and all the safeguards against imposition and fraud which the Legislature has imposed, must be substantially complied with. It is not the province of the courts to disregard them, or dispense with them and substitute others in their stead. This doctrine is well enforced and defended in the cases above cited, and was affirmed in its broadest sense, in this court, in the recent case of *Atherton vs. Thomas*, in MS., which was a case where the rule allowing the commission to issue, contained a command that the same be returned by mail, addressed to John B.

Moore, Clerk of the county of Broome, Binghampton, N. Y., and a copy of this rule was annexed to the commission and returned with it. The commission was otherwise, in all respects, properly executed and returned, and it was adjudged by this court, that the commission and deposition were properly excluded for the reason that the twenty-third section of the statute, (2 R. S. 394,) requires the officer settling the interrogatories to direct the manner in which the commission shall be returned, and adopting the rule that statutes which innovate upon the common law rules of evidence, must be strictly complied with, we held that the court could not waive this want of compliance with the statute, although we might be of opinion that the substitute was equally well calculated to guard against fraud. Applying this principle to the case under consideration, I do not hesitate to say that this commission should have been excluded. The statute requires the commissioners to indorse upon the commission their return. Is it a substantial compliance with the statute for them to make their return upon a distinct and independent paper, and then annex it to the commission or depositions? I do not hesitate to say, it is not, and that the sanctioning of such a practice in making the return, would be but ill calculated to guard against fraud and imposition in the execution of the commission. The fact that such return may be attached or detached from the commission, if made upon a separate and independent piece of paper, is a sufficient reason for not allowing these returns to be made in that way, were there no statute providing for the case.

It is sufficient, however, for our purpose that the Legislature, for wise reasons, have required the return to be indorsed upon the commission, and that the courts, therefore, have no right to depart from the requirements of the statute. For the reasons already stated, it is unnecessary to consider the other objections taken to this commission. The commission not having been properly executed, the depositions should have been excluded.

Parties should be exceedingly careful in the issuing of commissions, that they comply strictly with the require-

ments of the statute, as it appears by the authorities cited above, that the courts are very careful to observe the statutory provisions laid down for our guide.

It appears by the subsequent sections of the Revised Statutes, that after the commission is returned to the clerk of the court, he is to open it and file it in his office, and in analogy to that provision of the statute, it is the duty of the Justice upon receiving the commission back from the commissioner, to open the same and file it in *his* office for the benefit of the parties thereto.¹

A motion at the trial to suppress the whole deposition on the ground that some of the interrogatories and parts of the deposition are improper, should be denied. If any part of the deposition is competent, the objection should be confined to that which is not so. When pertinent evidence is given in answer to the general interrogatory, to which the attention of the opposite party was not called by the others, if he desire to cross-examine the witness as to such evidence he should apply to the court for relief before the trial. It is not ground for suppressing the whole deposition on the trial.

If any part of the evidence so given is incompetent or impertinent, such part may be excluded. Witnesses may be examined on commission as to an original paper by annexing a copy to the interrogatories for the purpose of reference, description and identification, and producing the original on the examination of the witness. It is not indispensable that the original be annexed to the interrogatories.²

Where depositions taken under a commission are offered in evidence, and to be read on the trial of a cause, and the other party objects to them on the ground that the interrogatories are *leading*, the question whether the interrogatories and the answers thereto are admissible, is one addressed to the discretion of the Court, and the same rule is to be applied to the case, which prevails where a witness is on the stand in court undergoing a personal examination at the trial.

¹ 2 R. S. 816, §§ 25, 26, 27 and 28.

² 1 Kernan R. 203, per Allen J.; 19 Barb. 392.

The decision of the Court in *Williams vs. Eldridge*, (1 Hill R. 249,) upon this question disapproved of, such questions are of necessity left very much to the discretion of the Judge at the trial, and unless it appears that he has abused the discretion, so that injustice has been done, his decision will not be disturbed.¹

¹ 12 Barb. 521.

CHAPTER IX.

Of the Trial and its Incidents.

Whenever issue shall have been joined in a suit before a Justice, if no jury shall have been demanded by either party, the Justice shall proceed to try such issue, to hear the proofs and allegations of the parties, and to determine the same according to law and *equity*, as the very right of the case may appear.¹

In doing this, the Justice ought to keep in mind, that he is acting in a two-fold capacity—as a Judge directing and controlling the proceedings, according to the established rules of law; and as a juror trying the facts. The first thing which it is the duty of the Justice to turn his mind to, and in doing which he will find advantage, is the issue between the litigant parties; that is, what they have affirmed on one side, and denied on the other. Persons unaccustomed to legal investigation, are very apt to drag into their altercations, on trial, abundance of extraneous irrelevant matter. To keep them to the true points, requires an attentive distinguishing mind; great convenience will result from observing rules and pursuing a correct system. This cannot be attained without very considerable attention to the doctrine of pleadings and evidence.

There is no such thing as a judgment by default in a Justices' Court, and it is therefore provided by statute, that whenever a defendant who has been personally served with a summons, or who shall have procured an adjournment without having joined issue, shall neglect to appear and join issue, the Justice shall proceed to hear the proofs and allegations of the plaintiff, and determine the same in the same manner as though an issue were joined.² The defendant's omission to appear and plead, is not considered as an admission of the plaintiff's demand, but he must establish it

¹ 2 R. S. 242, § 91; 4th ed. p. 441.] ² Id. § 92.

by testimony, in the same manner as though an issue had been joined.¹ And so, though the defendant appear and refuse to plead; for such refusal would not amount to an admission of the plaintiff's demand.

In an action against several defendants for a tort, when the trial is before the Justice without a jury, he may, when the plaintiff has closed his proof, discharge any of the defendants against whom no evidence has been given. The judgment, however, in such a case should not be entered until the final disposition of the cause.²

A cause cannot, without consent of parties, be tried at a place different from the one appointed by the Justice for the trial thereof; and where the trial was at a place different from the one mentioned in the summons, the judgment was reversed.³

The Justice should be careful not to mislead the party as to any fact material to influence his conduct in preparing for trial; for where a Justice stated to the defendant that the cause was discontinued, and yet proceeded to trial and gave judgment, it was reversed for that reason.⁴

The Justice may, where the exigency of the case requires it, continue his Court open from one day to another; as where there is a delay in summoning a jury.⁵ And he may even hold his Court open a reasonable time, to enable a party to procure a material witness—two hours was held not unreasonable in one case; but twenty hours was holden an abuse of discretion, where the witness was twelve miles distant.⁶

The statute in relation to Justices' Courts contains the following provisions:

§ 124. In cases where a plaintiff shall be non-suited, discontinued or withdraw his action, and where judgment shall be confessed, and in all cases where a verdict shall be rendered, or the defendant shall be in custody at the time of hearing the cause, the Justice shall forthwith render judgment and

¹ 10 John. 106; Code § 64, sub. 8; ⁴ 3 Id. 378.

³ E. D. Smith, 155; 29 Barb. 528; ⁵ 2 Caines, 134; Id. 137. per Kent, Ch. J.

² 3 Hill, 104.

³ 12 John. 417. ⁶ 13 John. 469.

enter the same in his docket. In all other cases he shall render judgment and enter the same in his docket within four days after the cause shall have been submitted to him for his final decision.¹

§ 125. When a balance shall be found in favor of a party, either by the verdict of a jury, or upon a hearing before the Justice, exceeding the sum for which the Justice is authorized to give judgment, such party may remit and release the excess, and may take judgment for the residue.

§ 2. Whenever a judgment shall be rendered in a Court of Justice of the Peace, in civil actions, it shall be with costs of the suit ; but the whole amount of the items of such costs to be included in the entry of judgment, except charges for the attendance of witnesses from another county, shall not in any case exceed the sum of five dollars, unless such suit shall be adjourned more than once, at the request, and on motion of the party against whom judgment shall be finally rendered ; and in such case the costs of such additional adjournment may be included in the entry of judgment.

And in all cases in which an issue is joined and trial had, and the damages recovered, shall exceed fifty dollars, or the plaintiff shall claim in his complaint a sum exceeding fifty dollars, and the defendant shall recover judgment, the prevailing party shall be entitled to costs not exceeding the sum of ten dollars, exclusive of witnesses' fees.²

Justices' Docket.

Every Justice of the Peace is required by statute to keep a book, in which he shall enter,—

1. The titles of all causes commenced before him :
2. The time when the first process was issued against the defendant, and the particular process issued :
3. The time when the parties appeared before him, either without process, or upon the return of process :
4. Where the pleadings are made orally, a concise statement of the complaint of the plaintiff, the answer of the

¹ 2 Comst. 134; 6 Hill, 38.

² Sess. Laws 1866, chap. 692.

defendant, the further pleadings of the parties, if any, and the issue joined :

5. Every adjournment, stating on whose motion, and at what time and place :

6 The issuing of a *venire*, stating at whose request, and the time and place of its return :

7. The time when a trial was had, the names of the jurors returned summoned, who did not appear, and the fines imposed on them, if any :

8. The names of the jurors who appeared, and of the jurors who were sworn ; the names of the witnesses sworn at the request of either party, stating at whose request ; the objections, if any, made to the competency of a witness, and the decision thereon :

9. The verdict of the jury, and when received :

10. The judgment rendered by the Justice, and the time of rendering the same :

11. The time of issuing execution, and the name of the officer to whom delivered ; and if issued upon the application of any party, before the time when the same should regularly issue, such fact shall be noted, and the nature of the proof given :

12. The return of every execution, and when made ; and every renewal of an execution made by him, with the date of such renewal :

13. The fact of his having given a transcript of the judgment, to be filed in the clerk's office, and the time when the same was given :

14. The fact of an appeal having been made from any judgment rendered by him, and the time when made.

Each of these items must be entered under the title of each cause to which they respectively relate ; and in addition thereto, the Justice may enter any other proceeding had before him in such cause, which he shall think it useful to enter in such book. He is also required carefully to file and preserve all affidavits and papers delivered to him, to be filed in any cause.¹

¹ 2 R. S. 268, §§ 243 to 245; [4th ed. p. 455.]

Justices' Docket—When Evidence.

The following provisions of the Revised Statutes relating to the evidence of the proceedings before Justices of the Peace, are of great practical importance, and are as follows :

§ 245. Whenever it shall become necessary, in an action before a Justice of the Peace, to give evidence of a judgment or other proceeding had before him, the docket of such judgment or other proceeding, or a transcript thereof certified by him, shall be good evidence thereof before such Justice.¹

§ 246. A transcript from the docket of any Justice of the Peace of any judgment had before him ; of the proceedings in the cause previous to judgment ; of the execution issued thereon, if any ; and of the return to such execution, if any, when subscribed by such Justice, and verified in the manner prescribed in the next succeeding section, shall be evidence to prove the facts stated in such transcript.

§ 247. To entitle such transcript to be read in evidence, except before the same Justice, there shall be attached thereto or endorsed thereon, a certificate of the clerk of the county in which such Justice resides, under the seal of the County Court of such county, specifying that the person subscribing such transcript was at the date of the judgment therein mentioned, a Justice of the Peace of such county.

§ 248. The proceedings in any cause had before a Justice may also be proved by the oath of the Justice. In case of his death or absence, they may be proved by producing the original minutes of such proceedings, entered in a book kept by such Justice, accompanied by proof of his handwriting ; or they may be proved by producing copies of such minutes, sworn to by a competent witness, as having been compared by him with the original entries, with proof that such entries were in the hand writing of the Justice.

§ 251. Every Justice shall keep an alphabetical index of all judgments entered in his docket-book, in the course of any judicial proceedings had before him. In such index shall be inserted the names of the parties to each judgment,

¹ 2 R. S. 269 ; [4th ed. p. 456.]

and the page of his docket-book where such judgment is entered.

§ 252. In case any Justice shall remove out of the town in which he was elected, before or after his term of office expires, he shall deposit with the town clerk of such town, all the books and papers in the custody of such Justice, relating to any cause or matter which shall have been heard by him, or relating to any proceeding or cause which shall have been commenced before him.

§ 253. Whenever any Justice shall be removed from office by the County Court, he shall, within ten days after receiving notice of such removal, and upon the demand of the town clerk, deliver to such clerk all the books and papers in the custody of such Justice, relating to any cause or matter which shall have been heard by him, or relating to any proceeding or cause which shall have been commenced before him.

§ 254. In every book of minutes delivered by any Justice to the town clerk, pursuant to the foregoing provisions, in which he shall have kept the docket of any judgments ; he shall enter a certificate to be subscribed by him stating that the judgments entered in such book, were duly rendered as therein stated, and that the amounts appearing by such book to be due on such judgments respectively, have not been paid to his knowledge.

§ 255. In case any Justice shall die, or his office shall in any way become vacant, and any books or papers belonging to such Justice in his official capacity, shall come to the hands of any person, the town clerk may demand and receive such books and papers from the person having the same in his possession.

§ 257. The entries contained in the book of minutes kept by any Justice, and by him delivered to the clerk, shall in all cases be presumptive evidence of the facts stated in such entries, but may be repelled by contrary proof.

§ 267. If in any action upon the judgment of the Justice, it is established that the docket of a Justice has been lost or destroyed, or that it cannot be produced after reasonable efforts to obtain the same, other proof of the fact of a judg-

ment having been rendered may be given, and may be repelled as other facts.

Of Trial by Jury.

It is provided by the statute as follows :

§ 93. After issue joined, and before the Justice shall proceed to an investigation of the merits of the cause by an examination of a witness, or the hearing of any other testimony, either of the parties or the attorney of either of them may demand of the Justice that the cause be tried by a jury.¹

This demand cannot be made until issue be joined, and the issue must be one of fact, for an issue of law can be decided only by the Justice.² The mere inspection by the Justice of a note in question in the cause, is not such an investigation into its merits, or hearing of testimony as will preclude the demand of a jury ;³ and in one case where the Justice told the plaintiff to go on to trial, after both parties had avowed themselves ready, and on being asked, the defendant admitted part of the plaintiff's account, and a witness for the plaintiff was partly sworn ; it was held too late to call for a venire.⁴

A venire cannot be issued when the defendant does not appear and plead. An issue of fact must be joined. (3 Caines' R. 219.)

So if an issue *in law* be joined, this is to be decided by the Justice without a jury.

A trial by jury may be demanded, either at the time of joining issue, or at any other time before the trial has commenced by an examination of a witness, or the hearing of any other testimony, but must be demanded in open Court.

Upon the demand of a trial by jury, the Justice shall issue a *venire* directed to any constable of the county wherein the cause is to be tried, commanding him to summon twelve good and lawful men, in the *town* where such Justice resides, qualified to serve as jurors, and not exempt from serving on juries in Courts of Record, who shall be in no wise of kin

¹ 2 R. S. 242, § 93; [4th ed. p. 441.] ³ 1 John. 142.

² 3 Caines, 219.

⁴ 1 Cowen, 235.

to the plaintiff or defendant, nor interested in such suit, to appear before such Justice, at a time and place to be therein named, to make a jury for the trial of the action between the parties named in such venire.¹

Form of the Venire.

STATE OF NEW YORK, }
ONEIDA COUNTY, } ss.

To any constable of said county, Greeting :

You are hereby commanded in the name of the people of the State of New York, to summon twelve good and lawful men of the town of , qualified to serve as jurors, and not exempt from serving on juries in Courts of Record, who shall be in no wise of kin to , plaintiff, or , defendant , nor interested in the suit to be tried, to appear before me, one of the Justices of the Peace of said county, at my office in the town of , on the day of 187 , at o'clock, in the noon, to make a jury for the trial of an action now depending before the said Justice, and then and there to be tried between the said parties; and have then there a list of the jurors you shall summon, and this precept.

Given under my hand, the day of , 187 .
 , Justice of the Peace.

The Justice is required to deliver, or cause to be delivered, the venire to some constable of the county, who is *disinterested* between the parties, and *against* whom no objection shall have been made by either party.

§ 98. The constable to whom any venire shall be delivered, shall execute the same fairly and impartially ; and shall not summon any person whom he has reason to believe biased or prejudiced for or against either of the parties. He shall summon the jurors personally, and shall make a list of the persons summoned, which he shall certify and annex to the venire, and return to the Justice.

As the 97th section of the statute requires the Justice to deliver the venire to a constable who is disinterested, and to whom no reasonable objection shall be made by either party, it is frequently necessary for a Justice to decide whether the

constable is disinterested and what is a reasonable objection. Strictly speaking, he can inquire into the existence of the cause of an objection only upon the oath of a party or third person. It is, however, common upon the simple objection of a party to having the venire delivered to a particular constable, for the Justice to deliver it to another who is free from objection. This course is a proper one where it will not produce unnecessary delay to find an unexceptionable constable. Any objection which would be a sufficient one to sustain a *challenge to the array*, if the jury had been summoned by him, is a sufficient objection to his receiving the venire. It would also be a reasonable objection that there was a hostility between the constable and the party objecting, or relationship, or a peculiar intimacy between him and the other party, so as to lead the Justice to believe he might exercise partiality in the selection of the jury. If it becomes necessary for the Justice to inquire into the cause of the objections, he should administer an oath to the party objecting, or the witness to prove it, which may be in the following form :

“ You do swear that you will true answers make to such questions as shall be put to you touching the reasons why David Hess should not execute the venire in this cause.”

The 98th section of the statute directs how the constable is to execute and return the venire. The manner of service may be, (as is the usual practice,) by reading or stating the substance of the venire to each person summoned. care being had to state the name of the Justice issuing the venire, together with the time and place of trial. The jurors should have a reasonable time to attend after notice, as in the case of witnesses. The officer's return with the panel will be *prima facie* evidence of the venire being duly served on a proceeding against a juror for his non-attendance;¹ for it is a general rule, that an officer's return, made officially, is *prima facie* evidence, even between third persons.²

The return must be in the following form :

“ I certify that by virtue of the within precept, I have

¹ 14 John. 482.

² 7 Cow. 310; 6 Hill, 553; 5 Denio, 586.

personally summoned as jurors, the several persons named in the annexed list. Dated the day of , 187 .

Const."

Where a venire has once been issued, unless it is waived, the Justice cannot try the cause without a jury.¹ The rule is, that a party demanding a venire may waive it, either expressly or by his conduct. Thus, where the party objecting had himself suppressed the venire, as if the Justice should deliver the venire to the party to be delivered by him to a constable, and he should neglect to do so, and at the return of the venire fail to appear, the Justice would have a right to consider it as a waiver of the trial by jury, and although he might issue another venire, he would not be bound to do so.² And so where the venire demanded by the party is not returned, and no further venire is demanded by him, but he contents himself with moving for a non-suit on that ground, which motion the Justice overrules, and holds the parties to a trial, this has been held right.³

Although the party demanding a trial by jury, has a right to waive such trial after a venire has been issued, yet if it has been served and returned, the other party would have a right to insist that the cause be tried by the jury thus returned, notwithstanding the party demanding the venire should waive it, and if a jury should not be obtained on that venire, he might require that a new venire should be issued at his instance.⁴

Every person duly summoned as a juror, who does not appear, nor render a reasonable excuse for his default, is liable to the same fine, and to be collected in the same manner as a defaulting witness.⁵

The parties may agree upon any number of jurors less than six to try the cause, and the Justice shall direct in the venire the summoning of so many jurors as shall be double the number so agreed upon.⁶

An agreement by the parties in a Justices' Court, for the trial of a cause by jury of less than six jurors, is good,

¹ 8 John. 460.

² 19 John. 384

³ 7 Id. 198.

⁴ See Edw. Treat. 3d ed. 89.

⁵ 2 R. S. 175, § 112.

⁶ Id. § 95.

though not made until after the return of the venire, and when the jury is drawn.¹

The following are the qualifications of jurors. They are to be males, of the age of twenty-one years or upwards, and under sixty years old ; and except in the counties of Niagara, Erie, Chautauque, Cattaraugus, Allegany, Genesee, Orleans, Monroe, Livingston, Jefferson, Lewis, St. Lawrence, and upon the New Stockbridge tract in the counties of Oneida and Madison, and the city of New York, possessed of personal property in their own right, to the amount of two hundred and fifty dollars ; or having a freehold estate in real property in the county, belonging to them in their own right or in the right of their wives, to the value of one hundred and fifty dollars ; in the possession of their natural faculties, and not infirm or decrepit ; free from all legal exceptions, (that is, not being aliens, and not having been convicted of an infamous crime,) of fair character, of approved integrity, of sound judgment and well informed.² In the several counties mentioned in the above exception, persons qualified in other respects, who shall have been assessed on the last assessment roll of the town, for land in his possession, which is held under contract for the purchase thereof, upon which improvements shall have been made to the value of one hundred and fifty dollars, and who shall own such improvements, shall be deemed qualified to serve as jurors. In the city of New York, no property qualification is necessary.³ In addition to the above qualifications, jurors in Justices' Courts must be inhabitants of the town in which the Justice resides, except in actions between two towns, in which cases, as provided by statute, the jury is to be formed of inhabitants of the county at large, without reference to the town of their residence.⁴

The statute directs the Court to discharge from serving on a jury the following persons, who should not, therefore, be summoned :

¹ Carman vs. Newell, 1 Denio R. 25. ³ Id.

² 2 R. S. 411, §§ 13, 14; [4th ed. p. ⁴ 2 R. S. 243, § 96, 4th ed. p. 441.]
656, § 6, and p. 657, § 14.]

1. Those who have not the property qualification, or are not qualified in respect to age, as above mentioned.

2. A non-commissioned officer, musician, or private of any uniformed company or troop, who is duly equipped and uniformed according to law, and who shall claim such exemption. The evidence of this exemption can only be given by the certificate of the commanding officer of the troop, dated within three months of the time of presenting the same, and the signature must be verified by oath.¹

3. A member of any company of firemen, duly organized according to law.

4. Any person in the actual employment of any glass, cotton, linen, woolen, or iron manufacturing company, by the year, month or season.

5. A superintendent, engineer, or collector of any canal, authorized by the laws of this State, any portion of which shall be actually constructed and navigated.

6. A minister of the gospel, or teacher in any college or academy; or, any person who is or shall be specially exempted by law from serving on juries.

The Court is also required to discharge a juror against whom there is any legal exception.

In addition to the above exemptions specially pointed out by statute, it is further provided, that the court to which any person shall be returned as a juror, shall excuse such juror from serving at such court, whenever it shall appear:

1. That he is practicing physician, and has patients requiring his attention.

2. That he is a Surrogate or Justice of the Peace, or executes any other civil office, the duties of which are, at the time, inconsistent with his attendance as a juror.

3. That he is a teacher in any school, actually employed and serving as such.

4. When, for any other reason, the interests of the public or the individual juror will be materially injured by such attendance, or his own health, or that of any member of his family requires his absence from such court.²

¹ 2 R. S. 336, § 34.

² 2 R. S. 336 § 35.

The party demanding a trial by jury has, undoubtedly, a right to waive such venire after it is issued, but if the venire has been served and returned, the other party may insist that the cause be tried by such jury.

Before proceeding to draw the jury, the Justice should call over the list of jurors returned by the constable; this being done the names of the persons so returned by the constable, and who appear, are to be respectively written on several and distinct pieces of paper, as nearly of one size as may be, and the constable, in the presence of the Justice, is to roll up or fold up such pieces of paper as nearly as may be, in the same manner, and put them together in a box or some convenient thing.¹

The Justice is then to draw out six (or such number as may have been agreed upon) of such papers one after another, and if any of the persons whose names shall be so drawn, shall be challenged and set aside, then such further number shall be drawn as will make up the number required, after all legal causes of challenge are allowed by the Justice.

The persons so drawn, appearing and approved as indifferent, are to compose the jury to try the cause.²

If a sufficient number of competent jurors are not drawn the Justice may supply the deficiency by directing the constable to summon any of the bystanders or others who may be competent and against whom no cause of challenge shall appear to act as jurors in the cause.³

If the constable does not return the venire, or if a full jury be not obtained in the manner above directed, the Justice is to issue a new venire, keeping his Court open, holding the parties, jurors, &c., present in attendance until the constable shall summon from the town the number of jurors wanted.⁴

Before the jury are sworn, if a party have any objection, either of interest or favor, or for other cause, against the constable summoning them, or any of the jurors, whether

¹ 2 R. S. 173, § 99.

² 2 John. 386.

³ 2 R. S. 174, § 101.

⁴ 2 Caines, 134.

originally summoned as such, or called as talesmen, he must state his objection to the Justice, which is called a challenge.

After the venire has been issued, the Justice cannot, as a general rule, try the cause without a jury. If, however, a venire be improperly suppressed by the party demanding it, the Justice has a right to consider him as waiving the trial by jury.¹

Challenge to the Jury.

Challenges are of two kinds—"to the array," and "to the polls;" and each of these is subdivided into principal challenges, and "challenges to the favor."²

A challenge to the array is an objection to the whole panel of jurors returned collectively; not for any defect in the jurors themselves, but for some partiality or default in the officer who arrayed the panel. This is either a principal challenge, or challenge to the favor.

Some of the causes of "principal challenge to the array" are the following: That the officer who makes the array is of kindred to either party within the ninth degree; that one or more of the jurors is returned at the nomination of either party; that an action of assault and battery, or other action implying malice, is depending between the officer and one of the parties; that a civil action is pending at the suit of the party against the officer, but not if by the officer against the party; that the officer is under distress of either party; that the officer is counsel, attorney, officer or servant of either party, or is an arbitrator in the same matter, and has treated thereof; that the constable who served the venire, appears as the attorney of the party demanding a jury against the consent of the other party; that the constable serving the venire does not reside in the county where the cause is tried. In penal actions for the recovery of any sum it is not good cause of challenge to the jurors summoned, or officers summoning them, that such juror or officer is liable to pay taxes in any town which may be benefited by

¹ 8 John. 460; Id. 384

² 1 Cowen, 486.

the recovery. (§ 58, art. 4, title 4, chap. 7 of part 3, R. S.)¹

The causes of challenge "to the array for favor," are such as imply, at least, a probability of bias or partiality in the officer, but do not amount to a principal challenge. Thus, that the plaintiff or defendant is the tenant of the officer ; or, that the son of the officer has married the daughter of the plaintiff or defendant, or the like.²

A challenge to the polls, is an exception to one or more of the jurors individually ; and this is either a principal challenge, or challenge to the favor.

Some of the causes of principal challenge to the polls are the following :

That the juror has not the legal qualification as to residence, age, property, &c., but a matter which merely exempts a man from serving on a jury, is not cause of challenge, the juror can only avail himself of the exemption ; that the juror is of kin to either party within the ninth degree ; that there is an affinity by marriage between the juror and one of the parties, if such affinity continue, or there be issue of the marriage alive ; that the juror has before given a verdict in the same cause, or upon the same matter, although between different parties ; that he has been arbitrator, and entered upon the examination of the same matter, having been selected by one of the parties ; that an action implying malice or displeasure is pending between the juror and one of the parties ? That the juror has been convicted of felony, perjury, conspiracy, forgery, &c., or has received judgment for an infamous crime ; that the juror has an interest in the suit, direct or collateral. When the county sues before a Justice, the electors and inhabitants of such county may be jurors. (§ 4, title 3, chap. 12 of part 1, R. S.) When a town sues, or is interested in a suit, the electors or inhabitants of such town may be jurors. (§ 4, title 5, chap. 11 of part 1, R. S.) It is good ground of principal challenge to a juror, that he has declared his opinion of the case before-

¹ 10 John. 107, § 94; 18 Id. 227, vol. 2 1 Cowen, 486.
2, p. 339, § 51.

hand ; but where a juror said " he had no personal knowledge of the matter in dispute, but that, if the reports of the neighbors were correct, the defendant was wrong and the plaintiff right," this was held no objection to the juror.¹

Causes of challenge " to the polls for favor," are where there is only probability from circumstances that the juror may be biased, as—that the juror is the fellow servant of one of the parties ; that one of the parties has been lately entertained at the juror's house. Jurors must be above all exception, as a general rule, and the application of this rule to each particular case, where the partiality is not apparent, must be left to the sound discretion of the triers.²

A Justice cannot, on his own motion, challenge and set aside the whole panel, and issue a new venire. He may, however, refuse to permit a drunken man to serve on a jury, and if neither party object, the fact of the intoxication will be conceded.³

Principal challenges, either to the array or to the polls, should be tried by the court. If, therefore, either party make a principal challenge, and the facts alleged as the grounds of the challenge be conceded, the Justice must either admit or reject the juror, or quash or sustain the array. If the facts alleged be denied, witnesses must be called and sworn ; and in cases where the cause of challenge does not go to his dishonor, the challenged juror may himself be a witness. The rule is, that the challenged juror may be asked such questions as do not tend to his infamy or disgrace.⁴

Form of Oath to Witness.

" You do swear that you will true answer make to such questions as may be put to you, touching the challenge depending."

In addition to the usual mode of challenges to jurors, the Legislature has provided that each party may have two

¹ 11 John. 168; 6 John. 332; People ² 18 John. 121.

vs. Bodine, 1 Denio, 281; a leading case on this subject, vol. 1, p. ³ 16 John, 469; 2 Cowen, 430.

376, 350; 1 Cow. 432; 1 John. 314; ⁴ 1 Cowen, 435; 16 John. 18; 19 John. 121

⁸ Id. 445.

peremptory challenges in civil cases ; and also in criminal cases before Courts of special sessions, as appears by the following act :

CHAP. 134.

An act to provide for additional challenges to Jurors, passed April 27, 1847.

The People of the State of New York, represented in Senate and Assembly, do enact as follows :

§ 1. Upon the trials of any issue or issues of fact, joined in a civil action, each party shall be entitled peremptorily to challenge two of the persons drawn as jurors for such trials.

§ 2. Every person arraigned and put on trial for any offense not punishable with death, or with imprisonment in a State Prison ten years, or for a longer time, shall be entitled peremptorily to challenge five of the persons drawn as jurors for such trial, and no more ; except that in cases tried in any Court of Special Sessions, said right of peremptory challenge shall extend to only two of said persons so drawn.

§ 3. Nothing in this act contained shall be deemed to prevent any challenges heretofore allowed, either to the array of jurors or to individual jurors.

When there is a challenge either to the array or polls, *for favor*, the mode of trying the question is this : The Justice must select two indifferent persons for triers ; and, in case the challenge be to the polls, and two persons shall have been sworn, they must be the triers, but jurors should not be selected when the challenge is to the array. He should then administer to the triers an oath.

Form of Oath on Challenge to the Array for Favor.

“ You shall well and truly try the issue of challenge to the array of jurors, in the suit wherein James Jackson is plaintiff, and John Stiles, defendant, and a true finding make, according to evidence ; so help you God.”

Oath on Challenge to the Polls for Favor.

“ You shall well and truly try whether John Doe, the

juror, challenged, stands indifferent, between James Jackson, plaintiff, and John Stiles, defendant, and a true finding make according to evidence ; so help you GOD."

Witnesses are then to be sworn before the triers, to whom an oath may be administered in this form :

" You do swear in the presence of Almighty God, that you will true answers make to such questions as shall be put to you touching the challenge now in question."

The triers shall then sit and hear the evidence, the witnesses being sworn, according to the form before given. They ought conscientiously to determine ; and if from the evidence given, they think there is reasonable ground of suspicion that the juror challenged does not stand wholly indifferent between the parties, they ought, without doubt or hesitation, to find the challenge *true* ; and on the other hand, if they think from the evidence that the juror stands entirely free from any reasonable suspicion of bias, they will find the challenge *not true*.¹

Where a juror is challenged for favor, the triers must find that he stands impartial and indifferent, or they should reject him.

It is the province of the Court to say what evidence is admissible, on the question of indifference, but its strength and influence in establishing the allegation of favor or bias, are for the triers alone to determine.²

According to the report of the triers, finding the matters alleged in the challenge true or untrue, the Justice must decide, and as the case may be, quash or affirm the panel, or reject or retain the juror.

§ 101. If a sufficient number of competent jurors shall not be drawn, the Justice may supply the deficiency by directing the constable to summon any of the bystanders, or others who may be competent, and against whom no cause of challenge shall appear, to act as jurors in the cause.

§ 102. If the constable to whom the venire shall have been delivered do not return the same as thereby required, or if a full jury shall not be obtained in the manner declared

¹ Pennington on Small Causes, 174 ² 18 Barb. 522

in the preceding sections, the Justice shall issue a new venire.

The proceedings by which a jury is to be obtained in a Justices' Court are purely statutory and should be strictly complied with, otherwise the judgment rendered cannot be sustained. The provisions of the statute providing for the manner in which a jury shall be procured in a Justices' Court, make it the duty of the constable to whom the venire is delivered to summon twelve good and lawful men to appear before the court at the time and place specified in the process. The names of the persons who shall appear, are written, &c.¹

The language of the statute is such that it would be impossible to comply with its directions, unless at least six jurors names are in the box.

In this case, he should continue his Court open, holding the parties, jurors, &c., present in attendance, until the constable shall summon from the town the number of jurors wanted.² The new venire is to be like the former one, with this difference, that instead of the full number of jurors originally wanted, it commands the constable to summon "*three good and lawful men, &c.*" [or other number wanted," "*to make so many of a jury, &c.*" The Justice may, if necessary, issue this process from time to time, till there be a full jury. On the jurors' appearing upon the new venire, they are called and sworn without being balloted for, though subject to the same challenges as regular jurors.

If no jurors appear, or none are found competent, or if the venire is quashed, or not returned, or the array challenged for good cause, &c., a new venire must be issued from time to time, until a jury is obtained qualified to try the cause. In such case, the second venire will be deemed the process of the party demanding the first, who consequently will have no right to object to any error therein.² A defendant is not entitled to a *nonsuit*, because the venire is not returned at the time appointed for trial; another venire may be issued;

¹ *Brisbane vs. McComber*, 56 Barb. 375. ² *2 Caines*, 134.

and if the defendant does not demand it, but goes to trial before the Justice, it is a waiver of the trial by jury.¹ The party demanding the jury process cannot object to the form of it.² It should preserve the characters of the parties, but, in a proceeding against joint debtors it need only mention the names of those who are duly and personally served with process, and who appear in court.³ Every defect in a venire is cured, if the party go to trial upon it without objection.

The venire being deemed the process of the party calling for it, he is bound in the first instance to pay the costs of executing it, and the jurors' fees at the time they bring in their verdict. They, however, are part of the costs of the suit and abide its event.⁴

Of Swearing a Jury.

After a full jury shall have been obtained, and not before, they are to be sworn. They may be sworn separately or any number of them at a time. It is usual to swear three at a time.

§ 103. To each juror the Justice shall administer an oath or affirmation.

Form of Oath to the Jury.

"You do swear well and truly to try the matter in difference between James Jackson, plaintiff, and Richard Roe, defendant, and unless discharged by the Justice, a true verdict give according to evidence."

After the jury are sworn, the Justice shall call over their names, and as the jurors answer, the constable should count them for the purpose of ascertaining that the jury contains the requisite number; and the Justice should then ask them if they have all been sworn.

§ 104. After the jury shall be duly sworn, they shall sit together and hear the proofs and allegations of the parties, which shall be delivered publicly in their presence.

¹ 7 John. 198.

² 2 Caines. 134.

³ 4 John. 222.

⁴ 18 John. 131.

Of Proceedings Against a Juror for Not Appearing on a Venire.

It is provided by statute as follows :

§ 112. Every person who shall be duly summoned as a juror, and shall not appear, nor render a reasonable excuse for his default ; or appearing, shall refuse to serve ; shall be subject to the same fine, to be prosecuted for and collected with costs, in the same manner, and applied to the same use, as herein before provided, in respect to a person subpoenaed as a witness, and not appearing, or appearing and refusing to testify :¹

A summons is first to be issued against the juror, which may be in the following form :

ONEIDA COUNTY, ss. The people of the State of New York, to any constable of said county, greeting :

We command you to summon John Doe, to appear before the undersigned, a Justice of the Peace, in and for said county, at his office in the town of Whitestown, in said county, on the 19th day of June inst., at one o'clock in the afternoon, to show cause why he should not be fined, according to law, for his non-attendance as a juror before the said Justice, [or before , Esq., a Justice of the Peace in and for the said county,] at his dwelling house in the said town, on the 12th day of June inst., in a certain cause then depending before the said Justice, [or before the said , Esq., such Justice as aforesaid,] in which James Jackson was plaintiff and Richard Roe defendant, and have you then there this precept. Given under the hand of the said Justice, this 16th day of June, 18 . Justice.

The summons is to be served and a return made in the same manner as when against a defaulting witness. The return of the constable is, *prima facie*, sufficient evidence of the juror being summoned. The cause or excuse shown, may be by the juror's own oath, the rule being the same in this case as in that of a witness.

If the Justice convict the juror of a default, he should make an entry thereof in his docket as follows :

¹ 2 R. S. 245; [4th ed. p. 443.]

ONEIDA COUNTY, ss. Be it remembered, that on the 19th day of June, 18 , John Doe is convicted before me, and fined the sum of *ten dollars*, besides *two dollars* costs, for non-attendance as a juror before me, [or before , Esq., one of the Justices of the Peace of said county,] at my [or his] dwelling house, in the town of Whitestown, on the 12th day of June inst., in a certain cause then and there depending before me, [or before the said Justice,] in which James Jackson was plaintiff, and Richard Roe, defendant.

Justice.

An execution against the juror for the fine, may be in the following form :

ONEIDA COUNTY, ss. The People of the State of New York : To any any constable of the said county, Greeting :

Whereas John Doe was, on the 19th day of June, 18 , convicted and fined by the undersigned, a Justice of the Peace in and for the said county, the sum of *ten dollars*, besides *two dollars* costs, for non-attendance as a juror before the said Justice, [or before , Esq., one of the Justices of the Peace of the said county,] at his dwelling house, in the town of Whitestown, in said county, on the 12th day of June inst., in a certain cause then and there depending, before the said Justice, [or before the said , Esq., such Justice as aforesaid,] in which James Jackson was plaintiff, and Richard Roe, defendant ; a record of which conviction, and of the cause thereof, has been duly made up and entered in the docket of the undersigned. And whereas the said John Doe has neglected to pay the said fine and costs :

You are hereby commanded to levy the said fine and costs of the goods and chattels of the said John Doe ; and for want thereof, to take and convey the said John Doe to the jail of the said county, there to remain until he shall pay such fine and costs. And the keeper thereof is required to keep the said John Doe in close custody in said jail, until the fine and costs aforesaid be paid, or until thirty days after the commencement of his imprisonment. Given under the hand of our said Justice, at the town of Whitestown, on the 19th day of June, 18 .

Justice.

The mode of levying this warrant or execution, the power

of the Justice to convict, and his protection against a prosecution for the same, are in all respects similar to those in regard to proceedings against a defaulting witness.

Of the Proceedings on the Trial.

When the cause is ready for trial before the Justice without a jury, or if to be tried by a jury, after the jury have been sworn, it is the right of the party holding the affirmative of the matter to be tried, to open and state his case, and call his witnesses to prove it. This right usually belongs to the plaintiff; but it may, in certain cases, belong to the defendant. As if the defendant, without denying the complaint, should merely plead payment of the plaintiff's demand on which issue is joined, this plea admits the matters stated in the complaint, and it will be incumbent on the defendant, in the first place, to prove the payment; he therefore will hold the affirmative, and will have the right to open the case, and call and examine his witnesses.¹

The party who opens the case to the Court or jury, briefly states the nature of the action, the names of the parties, the nature and substance of the complaint of the plaintiff, what kind of defence the defendant has interposed, and the substance of the evidence which he expects will be given on the trial.

After opening the case, the party who holds the affirmative of the issue (and I will suppose the plaintiff,) proceeds to offer his evidence either by producing documentary evidence, such as various kinds of records or writings, or by calling his witnesses. The opposite party may and should object to the evidence when thus offered, (providing he desires to do so,) in order to get the decision of the Court upon the admissibility or relevancy of the testimony thus offered, and should the Justice in such case when the question is thus raised before him, make an erroneous decision upon the admissibility thereof, and which materially affected the rights of either party, the error would be corrected on appeal.

¹ Edw. Tr. 91.

The plaintiff, after having his witness sworn, which may be as follows :

Form of an Oath to be Administered to a Witness.

“ The evidence you shall give relating to the matter in difference between James Jackson, plaintiff, and John Stiles, defendant, shall be the truth, the whole truth and nothing but the truth ;”

Proceeds to examine upon all the matters within his knowledge bearing upon, or material to the case, after which he may be cross-examined by the defendant upon any or all the matters of which he was inquired by the plaintiff, or to a new matter pertinent to the case which the defendant desires to prove by him. Should any new facts arise out of the cross-examination, or should the plaintiff desire to prove any other fact, he may re-examine him, and so on till both sides are through with him.

After the plaintiff has gone through with his evidence, by examining all his witnesses, and producing all his evidence which he has or deems necessary to maintain the action on his part, and rested his case, the defendant, if he be of opinion that the plaintiff has not produced sufficient to entitle him to maintain the action, may move the court for a non-suit, and state his reasons in support of such motion, and the plaintiff should have an opportunity to state his reasons in opposition to the motion. If the Justice be of the opinion that the plaintiff has entirely failed to make out a case, it is his duty to non-suit the plaintiff and render a judgment against him for the defendant's costs : but if he has doubts about it, and desires time to examine the evidence, it is more safe to deny the motion, and hear the whole case before disposing of it finally.

If there be no occasion for the motion to non-suit, or the same is denied, the defendant proceeds to open the case on his part and state the nature of his defence, the evidence, if any, which he will introduce in support of it. He then produces his witnesses and such other evidence which may be in his power to give, the admissibility of which may be ob-

jected to by the plaintiff in his turn, and thus take the decision of the Court upon it, which decision may be reviewed if necessary and expedient, in the same way as before given. After the examination of the witness by the defendant, he may be cross-examined by the plaintiff, and re-examined by the defendant, and so on until closed. The Court, however, should not allow the parties to compel the witnesses to repeat over their testimony which they have already given upon their own examination, unless it be to correct mistakes or to get out the testimony more full and plain.

The examination of witnesses is in open court, and in the presence of the parties or their attorneys, who have the right to be present and hear the testimony, and before the Justice or the Justice and jury, who have thus an opportunity of observing the appearance, understanding, demeanor, bias and inclination of the witnesses, and are thus enabled to weigh their testimony and give such weight and credibility to it as their good judgments and understanding may dictate.

Of the Evidence.

The subject of *evidence*, as an incident of a trial will next receive our attention. The subject is too extensive and complicated to admit of a full, or sufficient explanation, within the limits prescribed for this work. I shall attempt to give such rules only as are applicable to cases most frequently occurring before Justices.

The word evidence, in legal acceptance, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. This term and the word proof are often used as synonymous with each other, but the latter is applied by the most accurate logicians, to the effect of evidence, and not to the medium by which truth is established.

By *competent evidence*, is meant that by which the very nature of the thing to be proved, requires as the fit and appropriate proof in the particular case, such as the production of writings, where their contents are subjects of inquiry. By *satisfactory evidence*, which is sometimes called *sufficient evidence*, is intended that amount of proof which ordinarily

satisfies an unprejudiced mind, beyond reasonable doubt. The circumstances which will amount to this degree of proof, can never be previously defined. The only legal test of which they are susceptible, is their sufficiency to satisfy the mind and conscience of a common man, and so to convince him, that he would venture to act upon that conviction in matters of the highest concern and importance to his own interests. Questions respecting the competency and admissibility of evidence are entirely distinct from those which respect its sufficiency or effect, the former being exclusively within the province of the Court, the latter belonging exclusively to the jury.

Cumulative evidence, is evidence of the same kind to the same point. Thus, if a fact is attempted to be proved by the verbal admission of the party evidence of another verbal admission of the same fact, is cumulative, but evidence of other circumstances tending to establish the fact, is not.¹

The General Rules of Evidence.

1. Whichever side hath the affirmative of the question, that side hath also the burthen of proof.

The first thing, therefore, which it is the duty of the Justice to turn his mind to, is the issue between the litigant parties; that is, what they have affirmed on one side, and denied on the other. It is important, in the first place, to ascertain on which side the burthen of the proof lies; for, in all issues, one party takes upon himself the proof of the fact in issue. This is usually, but not always, with the plaintiff.²

Averments in a pleading, which are wholly impertinent, and might be struck out without affecting the cause of action or defence, need not be proved; as if in a complaint on an express warranty of soundness, I state that the defendant knew of the unsoundness, if I prove the warranty and unsoundness as laid, I need not prove the defendant's knowledge; because the express warranty is enough, for the cause of action would be sufficiently stated and made out in proof

¹ Greenleaf Ev. §§ 1 and 2.

² Cow. Tr. by Tracy, 567.

though the averment of knowledge were stricken out of the complaint.¹ And, so where I allege that the defendant maliciously dug under my house, and caused its fall, proof that in digging a cellar adjoining me, he *negligently* did the injury complained of, sustains the issue; for the words maliciously, &c., may be stricken out and yet leave the complaint good.² So in an averment that a note was assigned, for value received, the words for value received are immaterial, and need not be proved, and the complaint is proved, though the assignment do not contain these words; but the averment that the defendant made his promissory note, setting it forth, and adding "being for value received," must be sustained by a note containing the words "for value received;" for the averment is a description of the contract.³

But in regard to records, writings or contracts, which make a part of the plaintiff's case, the ancient rules required that they must be proved as laid, although parts of them were stated which were altogether immaterial; for the reason that such records, writings or contracts are entire, and a part only cannot be stricken out, so as to make them conform to the evidence. The provision of the Code that a variance between the proof on the trial and the allegations in a pleading shall be disregarded as immaterial, unless the Court shall be satisfied that the adverse party has been misled thereby, will now, in most cases, cure any immaterial omission or variance in the description of record or written instrument. It is, however, prudent in all cases to set out barely so much of a record or written instrument as will, according to its legal effect, make out an action or defence. It is always sufficient to state the contract according to its true sense, or legal effect, without adopting its very words, and this, whether it be in writing or by parol, sealed or unsealed. When so stated, however, it must be proved substantially as laid. But if the Justice is satisfied that the variance has not misled the opposite party, he should disregard it; and although the party has been misled, if he is

¹ Cowen's Tr. 569.

² 17 John. 92.

³ 10 John. 418; and see cases cited in Cowen & Hill's Notes to Phil. Ev. p. 525.

satisfied that substantial justice will be promoted by permitting an amendment to the pleadings to enable them to conform to the proof, he should allow it, giving an adjournment if necessary to enable the adverse party to bring evidence to meet it.

Evidence is either *positive* or *presumptive*. It is positive when a witness speaks directly to a fact from his own immediate knowledge ; and presumptive, when the fact itself is not proved by direct testimony, but is to be inferred from circumstances, which either necessarily or usually attend such facts. It is obvious, therefore, that a presumption is more or less likely to be true, according as it is more or less probable that the circumstances would not have existed unless the fact which is sought to be inferred from them had also existed ; and that a presumption is to be relied on no longer when the contrary is actually proved. In order to raise a presumption, it cannot be necessary to confine the evidence to such circumstances alone, as could not have happened, unless they had been also attended by the alleged fact ; for that would, in effect, be to require in all cases evidence amounting to positive proof ; but it will be sufficient to prove those circumstances which usually attend the fact. If the circumstances be such as may afford a fair and reasonable presumption of the fact to be tried, they are to be received and left to the consideration of the jury, (or of the Justice sitting as a jury,) to whom alone it belongs to determine on the precise force and effect of the circumstances proved, and whether they are sufficiently satisfactory and convincing to warrant them in finding the fact in issue. However, for the purpose of trying the weight and effect of such presumptive proofs, it will often be of the utmost consequence to consider, whether any other fact happened, which might have been attended by the same circumstances, and to determine with which of the facts they are most consistent.

A receipt for rent down to a certain day, is strong presumptive evidence, that all rent previously accrued had been paid, until the contrary be proved.¹ So the giving of a

¹ 15 John. 479.

promissory note is *prima facie* evidence of an accounting and settlement of all demands between the parties, and that the maker was indebted to the payee upon such settlement to the amount of the note.¹ Proof that the plaintiff and other workmen of mine, come every week to receive their pay, and that I was in the habit of paying weekly, and that the plaintiff has not been heard to complain of non-payment, is presumptive evidence of payment. An order to pay money in the hands of the drawee, is evidence of payment; otherwise of an order to deliver goods. A cash account shown to the defendant and not objected to, is evidence for the consideration of the jury. Possession of land or a chattel is *prima facie* evidence of property.²

Judgments of Courts of Record, and debts due on sealed instruments were formerly presumed to be paid after the lapse of twenty years. But the presumption might have been repelled by showing payment of some part, or a written acknowledgment.³

Sometimes the acts of a party are conclusive, and supercede all higher or other proof. The most important instances of which, for our purpose, are the case of a tenant, who cannot dispute the title of his landlord;⁴ and a man who suffers a woman to pass in the world as his wife, cannot contradict the fact of her being so, against one who has given credit on the faith of such appearance.⁵

Proof of Writings and Records.

Wherever a writing is a necessary part of the evidence in establishing the action or defence, it must be produced. Thus, a writ,⁶ or a bond, lease, or other specialty under seal, or a bill of exchange, promissory note, or any other written instrument, must be produced before any evidence can be given of its contents.⁷

If there be subscribing witnesses to such writing, they

¹ 2 Selden, 461; 5 Denio, 304.

⁴ Cowen and Hill's Notes to Phil. Ev.

² 1 Phil. Ev. 159, 160; Cowen and Hill's Notes, 314.

201.

⁵ Id.

³ 2 R. S. 301, §§ 47, 48; [4th ed. p. 564.]

⁶ 6 John. 19.

⁷ 12 John. 221.

alone are competent to prove it, and at least one of them must be produced on the trial.¹

But both these rules are subject to various exceptions.

1. If the writing be of a public nature, as if it be a State record on file with the Secretary of State, a record of Chancery, of the Supreme Court, or County Court; in all these cases, though the writing be directly in issue upon an answer denying that there is such a record,² a copy exemplified, or certified in the mode pointed out by 2 R. S. 403, § 59, [4th ed. p. 642,] by the officer having the custody, under his official seal is sufficient, as well as the record itself. One or the other of these must, it seems, be produced when the record is directly in issue upon an answer denying its existence, and which, when pleaded alone, is triable by the record only.³ When the record is only *inducement*, or, in other words, not directly denied by the pleadings, it may be proved as in the following exception:

2. In cases where the record is not directly in issue, but the action or defense is grounded upon some other matter, and the record is mere inducement, but yet a necessary link in the chain of testimony, or comes collaterally or incidentally in question, either exemplified or sworn copies, made and compared as hereinafter mentioned, are admissible in evidence.

3. A rule of court under the hand of the proper officer, as a clerk of a Supreme or County Court, is original and good evidence itself, upon its mere production, without further proof, the same as an exemplification.⁴ This is called an *office copy*. Copies of affidavits served on the opposite party, upon which to ground a motion, have also been held equivalent to office copies, and as such are admissible in evidence.⁵ A verdict alone of a Court of Record, without the judgment or decree founded upon it, is not evidence.⁶ But a verdict in a Justices' Court is evidence, without the judg-

¹ 1 Phil. Ev. 464, 696; Cowen and ³ 6 Wend. 512.

Hill's Notes to Phil. Ev. 1261 to ⁴ 11 John. 434.

1263, 1349.

⁵ 11 John. 434.

² Com. Dig. Pleader, 2 W., Record ⁶ Bull. N. P. 234; Willes, 367.

C.; Strange, 1171.

ment ; for a Justice cannot, like a Court of Record, either arrest a judgment or grant a new trial, but is bound to render judgment thereon ; and should he omit to do this, the law will, itself, attach the proper judgment to the verdict.¹

4. A proceeding in a cause before a Justice of the Peace, though it is so far a record, is proveable in the manner provided by the Revised Statutes.² Where the transcript is to be read before the same Justice it is sufficient that a certificate be annexed thereto in the following form :

“ A copy. , *Justice of the Peace.*”

The statute directs very minutely how a Justice shall make his docket entries. In preparing his transcript, therefore, he has only to copy the entries in his docket, and subscribe the same. To this copy may be attached, or endorsed, the official certificate of the Clerk, thus :

STATE OF NEW YORK, }
Oneida County Clerk's Office, } ss.

I, , Clerk of said county, do hereby certify that , Esquire, whose name is subscribed to the annexed certificate, was, on the date of the same, a Justice of the Peace in and for the said county, and duly authorized by law to take the same. And further, that I am well acquainted with the hand writing of said Justice, and verily believe his signature to the said certificate is genuine.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said county, the
[L. s.] 16th day of June, 187 . , *Clerk.*

The transcript thus authenticated is evidence in all courts, and may be used in favor of the Justice as well as others, and this though it be made out after he has ceased to be in office. But it seems the *transcript* cannot be received as evidence of any proceeding, if there be no judgment, though before the Justice himself his docket may be read. The transcript cannot, of course, be received as evidence of any matters which the Justice is not authorized to enter on his docket, pursuant to the statute. Section two hundred and

¹ 2 John. 181.

² 2 R. S. 269, [4th ed. p. 456;] 15 Wend. 237.

forty-three points out the specific items of entry. Section two hundred and forty-four refers to the extent of the docket and consequent evidence derivable from it, in some measure to his discretion, so long as it is confined to matter which properly belongs to the cause pending before him. The Justice may doubtless state in his docket the matters which were actually tried before him, and what was submitted to or withdrawn from the consideration of the court or jury, where he shall deem either to be material. His transcript then exhibits these facts. So items of evidence may sometimes also become a material subject of entry, and be shown in the same manner.¹

The directions contained in the statute must be strictly followed in the frame and mode of authenticating this kind of evidence, or it will be inadmissible. If the certificate or transcript omit to state what evidence was given on the former trial, or what was submitted or withdrawn from the consideration of the court or jury, this may be proved by parol evidence on the oath of the Justice, or counsel, or a bystander, &c. This is the rule even in a Court of Record.² And the minutes of the evidence made by the magistrate, or other person upon a trial, are no higher in degree than their verbal evidence, and, therefore, need not be produced though they may be resorted to in order to refresh the memory of the witness, like all other memoranda made at the time of a transaction. If the minutes be original entries made at the time, they may, on this being proved by the person who made them, be themselves received as proof, though the witness may have forgotten the facts.³ This transcript of the Justice, properly authenticated, is, like a record, conclusive evidence, and cannot be contradicted by parol testimony.⁴

5. The right of proving papers by sworn copies is, by no means, confined to the cases mentioned in the second exception. Wherever the writing to be proved is of a public

¹ See 13 John. R. 184.

² 16 John. 186; 2 Id. 227; Cowen & Hill's Notes to Phil. 837 to 840, 952, 971. 2, and cases there cited.

³⁻¹ Phil. Ev. 221, and Notes by Cowen & Hill, pp. 550, 750 to 759, 579 to 585.

⁴ 13 John. 184.

nature, and therefore properly confined to a single place for the inspection of all whom it may concern, a sworn copy is good evidence. Thus, not only the records, books, and other papers properly and officially on file, or belonging to the various offices of State, and of our courts of justice, are susceptible of proof in this manner, but a great variety of others of inferior importance or authority; as those in official custody of the clerk of the Board of Supervisors, town clerks, school district clerks, and the proper officers of other municipal corporations.¹ It is, doubtless, within the same principle, that the sworn copy of a Justice's docket in evidence. It is necessary that these sworn copies should be received in evidence as well for the security of the instrument as for the convenience of the public.² Though it has been denied that the rule extends to the papers of a private corporation; as a bank, insurance company, turnpike company, church library, and the like.³

Copies of all papers duly filed in the office of the town clerk, including those filed with him as clerk of the commissioners of common schools, and transcripts from the book of records, certified by him, shall be evidence, in all courts in like manner as if the originals were produced.⁴ The certificate may be as follows:

ONEIDA COUNTY, TOWN OF DEERFIELD, ss. I certify that the above is a copy of an instrument in writing, duly filed in the office of town clerk of the said town. I have compared it with the original on file in my office, and the same is a correct transcript therefrom, and of the whole of said original.

, *Clerk of said Town.*

The Revised Statutes provide that a great variety of official certificates may be read in evidence, and that the transcript of original documents in the hands of a large number of officers may be certified by them so as to be read in evidence. As a reference to the more important of them will be of frequent advantage to a Justice of the Peace, it is here given. The certificates of the board of canvassers

1 1 Phil. Ev. 424, and notes 1165, 6. 2 1 Phil. Ev. 424.

See also index to 4th ed. R. S. 3 Phil. Ev. 424.

title Evidence.

4 1 R. S. 350, § 16, [4th ed. p. 659.]

authorized to canvass the votes given for any elective office, is evidence of the election of the person therein declared elected.¹ The transcript of the record of a conveyance duly recorded, may be read with the like force as the original conveyance.² The discharge of an insolvent debtor, or the record or a transcript thereof, is evidence of the proceedings and facts therein contained.³ The record of the proof of a will, exemplified by the Surrogate or clerk of the Supreme Court, is evidence in certain cases.⁴ Copies of records and papers in the office of the Secretary of State, certified by him and authenticated by his seal of office, are in all cases, evidence in like manner as the originals;⁵ copies of papers deposited or filed in the office of the Comptroller and State Engineer and Surveyor, certified by the officer in whose office they are deposited, are, in all cases, evidence equally and in like manner with the originals.⁶ Copies of all papers duly filed in the office of the County Clerk, and transcripts from the books of records kept therein, certified by such clerk, with the seal of his office affixed, shall be evidence in all courts in like manner as if the originals were produced.⁷

The following provisions of the Revised Statutes prescribe the manner of authenticating copies of records to be used in evidence.⁸

§ 59. Wherever a certified copy of any affidavit, record, document or other paper, is declared by law to be evidence, such copy shall be certified by the clerk or officer in whose custody the same is required by law to be, to have been compared by him with the original, and to be a correct transcript therefrom, and of the whole of such original; and if such officer have any official seal by law, such certificate shall be attested by such seal; and if such certificate be given by the clerk of any county, in his official character as such clerk, it shall be attested by the seal of the Court of

¹ 1 Id. 118, § 17, [4th ed. p. 329.]

² 1 Id. 759, § 17. [4th ed. vol. 2, p. 167.]

³ 2 Id. 38, §§ 19, and 20, [4th ed. p. 216 217.]

⁴ 2 R. S. 59, § 18, [4th ed. R. S. vol. 2, p. 242,] Laws 1837, ch. 460, § 38 [4th ed. R. S. vol. 2, p. 243, § 17.]

⁵ 1 R. S. 166, § 4, [4th ed. p. 384.]

⁶ 1 R. S. 188, § 17, [4th ed. p. 408.]

⁷ 1 R. S. 377, § 65; [4th ed. p. 689.]

⁸ 2 R. S. 403; [4th ed. p. 649.]

Common Pleas [County Court] of the county of which he is clerk.

§ 60. But the last section shall not be construed to require the affixing of the seal of any Court to any certified copy of any rule or order made by such Court, or of any paper filed therein, when such copy is used in the same Court, or before any officer thereof; nor to require the seal of the Supreme Court to be affixed to a certified copy of any rule or order of that Court, when used in any Circuit Court.

By act of Congress passed May 26, 1790, the records and judicial proceedings of the Courts of any State in the United States, are proved or entitled to be admitted in the Courts of any other State, upon being authenticated by the attestation of the clerk and the seal of the Court annexed, if there be a seal, together with the certificate of the Judge, Chief Justice or presiding magistrate, as the case may be, that the said attestation is in due form. Such records and judicial proceedings, authenticated as aforesaid, have the same faith and credit given to them in every Court of the State where they may be offered, as they have by law or usage in the Courts of the State from which such records are taken.

§ 426. (Am'd, 1869.) *Laws of other states and governments, how proved.*

Printed copies of statutes, code or other written laws, and of the proclamations, edicts, decrees and ordinances, by the executive power of any state or territory or foreign government, when printed in books or publications purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law, in the courts and judicial tribunals of such state, territory or government, shall be admitted by the courts and officers of this state, on all occasions, as presumptive evidence of such laws, proclamations, edicts, decrees and ordinances. The unwritten or common law of any other state or territory or foreign government, may be proved as facts by parol evidence, and the books of reports of cases adjudged in these courts, may also be admitted as presumptive evidence of such law. (Code of Procedure, § 426.)

The Revised Statutes contain the following provisions in relation to testimony taken in and evidence of the judicial proceedings of another State:¹

§ 25. In cases where by law the affidavit of any person residing in another State of the United States, or in any foreign country, is required or may be received in judicial proceedings in this State, to entitle the same to be read, it must be authenticated as follows :

1. It must be certified by some Judge of a Court having a seal, to have been subscribed and taken before him, specifying the time and place where taken :

2. The genuineness of the signature of such Judge, the existence of the Court, and the fact that such Judge is a member thereof, must be certified by the Clerk of the Court, under the seal thereof.

§ 26. The records and judicial proceedings of any Court in a foreign country, shall be admitted in evidence in the Courts of this State, upon being authenticated as follows :

1. By the attestation of the clerk of such Court, with the seal of such court annexed, or of the officer in whose custody such records are legally kept, with the seal of his office annexed :

2. By a certificate of the Chief Justice or presiding magistrate of such Court, that the person attesting such record is the clerk of the Court, or that he is the officer in whose custody such record is required by law to be kept ; and in either case, that the signature of such person is genuine : and,

3. By the certificate of the Secretary of State, or other officer of the government under whose authority such Court is held, having the custody of the great or principal seal of such government, purporting that such court is duly constituted, specifying generally the nature of its jurisdiction, and verifying the signature of the clerk or other officer having the custody of such record, and also verifying the signature of the Chief Justice or presiding magistrate.

§ 27. Copies of such records and proceedings, in the Courts

¹ 2 R. S. 396; [4th ed. p. 641.]

of a foreign country, may also be admitted in evidence, upon due proof,

1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of such original :

2. That such original was in the custody of the clerk of the Court, or other officer legally having charge of the same : and,

3. That such copy is duly attested by a seal, which shall be proved to be the seal of the Court in which such record or proceeding shall be.

§ 28. The preceding sections shall not prevent the proof of any record or judicial proceeding of the Courts of any foreign country, according to the rules of the common law, in any other manner than that herein directed, nor shall they be construed as declaring the effect of any record or judicial proceeding, authenticated as therein prescribed.

It is provided by an act of the Legislature, passed May 5, 1869, chap. 589, that whenever in any action in any court of this State, it may be necessary for any parties to such action, to prove any acts or transactions of any foreign corporations created by the laws of any other State or country, the book or books of such corporation may be received and read as *prima facie* evidence for that purpose in such actions, whether the parties thereto, or any of them, are or are not members of such corporation.¹

By chapter 270 of the Laws of 1850, authorizing the appointment of Commissioners of Deeds to reside in other States or Territories of the United States, the proof or acknowledgments of deeds and affidavits taken before them, and properly certified under their hands and seals, are received in evidence if a certificate of the Secretary of this State under his hand and official seal be affixed thereto, certifying that the Commissioner was at the time of taking the proof or acknowledgment, or of administering the oath or affirmation, duly authorized to take the same ; that the Secretary is acquainted with the hand writing of the Commis-

¹ Sess. Laws of 1869, chap. 589.

sioner, or has compared the signature to the certificate with the signature of the Commissioner deposited in his office, and has also compared the impression of the seal affixed to said certificate with the impression of the seal of such Commissioner deposited in his office, and that he verily believes the signature, and the impression of the seal of said certificate to be genuine.¹

When the production of the original, or the copy of any paper is necessary as proof, even the confession of the party against whom it is intended to be used, unless made in court, will not dispense with the necessity of the regular proof.²

Sworn copies are to be proved like other transcripts, by a witness who has himself made the copy, or compared it line for line with the original, or who has examined the copy while another person read the original.³ He can generally determine whether the original paper be the true one by the place where, the person with whom, or the book in which he finds it, and is to state under oath in court, the mode in which he examined it, the same as if he were brought to prove any other fact, being equally subject to cross-examination. On the court being satisfied that the copy is a true one, it is received in evidence, if pertinent to the matter in issue. But no *copy* of a *copy*, examined as above, however authenticated, is admissible, provided the original be still in existence.⁴ It is otherwise if that be lost, and the copy be therefore resorted to as secondary evidence.⁵

6. The rule that the instrument itself must be produced, does not extend to mere written acknowledgment of facts, memoranda or notices. Thus, though a receipt be given, payment may be proved in any other way; and so, though a memorandum be made by a witness, if he can remember the same facts without a memorandum, he is not bound to produce it;⁶ and so of an account book or an original entry touching an account.⁷

¹ 4th ed. R. S. vol. 2, p. 165.

⁵ Id. and 1234, 1240.

² 6 John. 9; 10 Id. 248.

⁶ Cowen & Hill's Notes to Phil. Ev. 547, 550, 750.

³ 1 Phil. Ev. 386; Notes by Cowen and Hill, 1065, 1240.

⁷ Id. 700.

⁴ Cowen and Hill's Notes to Phil. Ev. 1065-6.

It is indispensable to the admissions in evidence of a memorandum made by a witness at the time of the making of an alleged agreement that it be shown, the witness *has no recollections of the matters stated therein*, independent of the written paper. If he has such recollections the evidence is indispensable. Where a witness testifies fully to an interview between the parties, at which an agreement was entered into, a memorandum of the terms of such agreement made by him at the time, *is not* admissible to corroborate the witness.¹

And a notice, though in writing, may always be proved by parol.² Though with the exception of notices, if you propose to prove the actual contents, you must produce the original, or account for its absence, as in other cases.³

In relation to Instruments attested by Subscribing Witnesses.

Any deed, or other private contract, or matter reduced to writing, and attested by a subscribing witness or witnesses, must be proved by the witness or witnesses, whose attestation appears thereto. But where there are several subscribing witnesses, the production of one is sufficient in all cases, if the witness produced can prove the regular execution of the instrument.⁴ But the law goes no further, and it is not necessary to produce the supposed writer or signer of a contract, or other instrument, in order to prove or disprove its execution. This may be done by proof of the handwriting, through third persons, where there are no subscribing witnesses. Thus, you may prove the handwriting of a Justice, to show that he issued process; or a constable, to show his return; and so in a great variety of cases.⁵

If a party has admitted the execution of a written contract, not under seal, this dispenses with the production of the subscribing witness,⁶ though it is otherwise of a sealed contract;⁷ and, in the first case, the admission ought to be

¹ Meacham vs. Pell, 51 Barb. 65; 15 N. Y. 485; 17 N. Y. 134; 22 N. Y. 462.

² Id. 547, 700, 750.

³ Id. 547.

⁴ 1 Phil. Ev. 464, 5, et. seq.; Cowen & Hill's Notes, 1261, 2.

⁵ Id. 223, and Notes, 553.

⁶ 2 John. 451.

⁷ 3 Id. 477; 16 Id. 201.

direct and explicit, for where A. demanded payment of a note of the defendant, but did not show it, nor state the amount nor date, and the defendant said he had given a note to H., which he would pay at a future day, this was held insufficient to dispense with the production of the subscribing witness.¹ The exception is peculiar to this State; and even here, it has been doubted whether it extends beyond negotiable paper.² It is difficult to maintain it on principle; and the authorities elsewhere demand the subscribing witness, notwithstanding the party's acknowledgment, whether the instrument be sealed or unsealed.³

If the subscribing witnesses are all incapable of being examined, the course then is to prove their handwriting, or the handwriting of one of them, which latter is enough. This course may be taken, where the subscribing witnesses are dead, or blind, or insane, or infamous, where they have become interested after subscribing, or where they are out of the jurisdiction of the court, so as not to be the subjects of a subpoena.⁴ It is so, in relation to a Justices' Court; if the subscribing witness be neither in the county where the cause is tried, nor in the adjoining county, this lets in inferior proof.⁵ And so in all cases where the witness cannot be found after strict and diligent inquiry.⁶

When a deed on its face has anything to excite a suspicion of fraud, the mere proof of a handwriting of a subscribing witness who has died, is not sufficient evidence to entitle it to be read. The party offering it, must in such a case, in addition to the proof of the signature of the attesting witness, give evidence explaining the suspicious circumstances, or prove the identity of the grantor.⁷

A party in the suit, or one having an interest in the verdict, may be a witness to prove the death or absence, beyond the

¹ Cowen & Hill's Notes to Phil. Ev. 1263, 1265; 16 John. 201. ⁴ 12 John. 188; 12 Barbour, 377; 13 Wend. 178; 5 Barb. 449.
² Cowen & Hill's Notes to Phil. Ev. 1263, 1265; also text to 1 Phil. Ev. 465. ⁵ 1 Phil. Ev. 473; 12 John. 188; and Cowen & Hill's Notes to Phil. Ev. 1294.
³ 1 Phil. Ev. 473, 4, Cow. & Hill's Notes, 1263, 1265. ⁶ 1 Phil. Ev. 473; Cow. & Hill's Notes, 1294.
⁷ 25 Wend. 259.

reach of a subpoena of the Justice, of a subscribing witness, or the loss of any instrument, which shall come in question on the trial, in order to introduce other proof of the execution or contents of such instrument; but in no other case, without the consent of the parties.¹

To this branch of the rule, there are, also, the following exceptions:

All conveyances or writings concerning real estate proved and recorded, and all other instruments proved pursuant to the provisions of the statutes are evidence of themselves. And when writings concerning real estate are recorded, the record or a duly certified transcript is also evidence. Either the original or copy is, however, but presumptive evidence of the execution of the instrument, and may be rebutted.

The proof or acknowledgment of a conveyance of real estate may be made before the following officers, viz: ² If within the State, Justices of the Supreme Court in any part of the State; and within their own county, city or town, Judges of County Courts, Mayors and Recorders of cities; Commissioners of Deeds in cities, Justices of the Peace in towns, and Notaries. (Notaries powers were enlarged in 1859.) If out of the State, the Chief Justice, and Associate Justices of the Supreme Court of the United States, District Judges of the United States' Courts, the Judges or Justices of the Supreme, Superior, or Circuit Courts of any State or Territory within the United States, the Chief Judge or any Associate Judge of the Circuit Court of the United States in the District of Columbia, within the place or territory to which the jurisdiction of the Court to which he belongs extends; the Mayor of any city in the United States, any Consul of the United States resident in any foreign port or country, a Judge of the highest court in Upper or Lower Canada; and when made by any person residing out of this State and within any other State or Territory of the United States, before any officer of such State or Territory authorized by the laws thereof to take the proof and acknowledgment of deeds, with a certificate under the name and official seal of the clerk or register of the county in which the officer

¹ 2 R. S. 174, § 106.

² 2 R. S. [4th ed.] p. 162.

taking the acknowledgment resides, specifying that such officer was, at the time of taking the proof or acknowledgment, duly authorized to take the same, and that such clerk or register is well acquainted with his handwriting and verily believes that the signature to the certificate of proof of acknowledgment is genuine.

Parol Evidence as to Writings.

It is a general rule that parol evidence is not admissible to contradict, vary, or add to an instrument in writing.¹

But parol evidence may be given of fraud, failure of consideration, or a subsequent agreement to enlarge the time or waive the performance of a written contract.²

Where an action, or a set-off, is founded upon a sealed instrument, the seal is only presumptive evidence of a consideration, which may be rebutted in the same manner and to the same extent, as if the instrument were not sealed. But this defense must be specially pleaded, or notice thereof given with the general issue. (§§ 77 and 78, Art. 8, Title 3, Chap. 7, of Part 3, R. S.³)

The rule that parol evidence cannot be given to contradict a writing, is confined to parties and privies, and does not extend to strangers who are interested in knowing the real truth of the case.⁴

To the above general rule there is this important exception: That a *receipt*, although drawn in absolute terms and expressed to be in full, is not conclusive, and parol evidence is admissible, either to explain or show a mistake in it. And parol evidence has been allowed to be given of a receipt, without accounting for the absence of the writing.⁵

Parol evidence will not be received for the purpose of engrafting upon a deed any condition, limitation or reservation inconsistent with its terms.

Under the statute of frauds, parol evidence is inadmissible to establish a trust respecting real estate.⁶

¹ 1 John. 189; 11 Id. 201; 14 Id. 1; 8 Id. 189, 365.

² 1 Cowen, 249; 1 John. Cases, 22; 3 John. 528; 1 Cowen, 349.

³ 11 Wend. 107; 2 R. S. vol. 2, p. 328, § 97.

⁴ 10 John. 229.

⁵ 8 John. 389; 9 Id. 310; 14 Id. 210; 20 Id. 338; 7 Cowen, 334.

⁶ 6 Barb. 98.

Parol evidence is inadmissible to contradict or explain a written agreement.¹

A receipt is so far an exception to this rule that it may be explained, *as to the consideration part*, when the explanation is not contradictory to, but consistent with the instrument. A receipt, however absolute in its terms, cannot be shown, by parol evidence, to be upon condition, except on a proceeding to reform the instrument for fraud or mistake.²

The written instrument must be considered as containing the true agreement between the parties, and as furnishing better evidence than any which can be supplied by parol. (1 Phil. Ev. 561.) Even with respect to a receipt, it is only the consideration part which may be explained by parol, and the explanation which is admissible is that kind of explanation which is not contradictory to, but consistent with, the instrument. (McKinstry vs. Pearsall, 3 John. 319.) Thus, in Toby vs. Barber, (5 John. 68,) a receipt for one hundred and sixty-three dollars in full for the second and third quarter's rent was given in evidence, and the adverse party was allowed to show that the sum mentioned in the receipt embraced a promissory note for \$115, given by a third person, payable at the bank in four months, and that the maker failed and took the benefit of the insolvent act before the note became due. This evidence was not inconsistent with the receipt. It merely showed of what the consideration of the receipt was composed, and that the plaintiff had not been benefited by it to its full extent. To the same effect is Johnson vs. Weed, (9 John, 310,) Putnam vs. Lewis, (8 Id. 389,) and Southwick vs. Hayden, (7 Cowen, 334.)

The doctrine prevailed for a short time in this court that a deed, absolute in its terms, might be shown in a court of law, by parol evidence, to be a mortgage. (Roach vs. Cosine, 9 Wend. 227; Walton vs. Cronley, 14 Wend. 63; Swart vs. Service, 21 Wend. 36; Webb vs. Rice, 1 Hill, 606.) The doctrine was strenuously resisted by some of the Judges, and never met the acquiescence of the bar. Moreover, it was found in practice to be fraught with all the evils

¹ 6 Barb. 468.

² 6 Barb. 458; 4 Selden, 402; 11 Barb. 36.

which led to the passage of the statute of frauds, and was clearly a departure from the wise provisions of that statute and the maxims of common law. (Stearns vs. Cooper, 1 John. Ch. 429.) It was at length finally overthrown by the Court of Errors, in Webb vs. Rice, (6 Hill, 219,) by a nearly unanimous vote, and the older and better rule restored.

The Best Evidence to be Given, &c.

It is a general rule that the best evidence must be given of which the thing is capable. Thus, a *copy* of an instrument may not be given in evidence when the original can be produced; nor parol evidence given when written proof of the same matter can be offered.¹

If, however, a writing is proved to be lost or destroyed, parol evidence of its contents, may be given. And the loss or destruction of a writing, for the purpose of letting in secondary evidence of its contents may be proved, by an interested witness, and even by the party himself. This evidence is exclusively to the court.²

Whenever a party to an action shall have been permitted to prove the loss or destruction of an instrument by his own oath, for the purpose of letting in other proof of its contents, the adverse party may also be examined by the court on oath, to disprove the loss, and account for the instrument. If the lost instrument be a negotiable promissory note or bill of exchange, and it appear that the note or bill was lost while it belonged to the party claiming the amount due thereon, secondary evidence of its contents may be given; but such party cannot recover therefor unless he shall execute to the adverse party a bond in a penalty at least double the amount of the lost note or bill, with two sureties, to be approved by the court, conditioned to indemnify the adverse party, his heirs and personal representatives against all claims by any other person on account of such lost note or bill, and against all costs by reason of such claim. (§§ 74, 75 and 76, Art. 8, Title 3, Chap. 7 of Part 3, R. S.³)

¹ Phil. 167; 7 John. 19; 12 Id. 221; ² Sec. 106; 16 John. 193; 51 Barb.
10 Id. 363; 8 Id. 149; 10 Id. 374; 580.

5 Cowen, 123.

³ 2 R. S. 327, §§ 95, 96; 12 Wend. 174.

When one of the parties wishes to avail himself of a writing, in the hands of the opposite party, he must give previous notice to the party to produce the writing to be used on the trial, or that evidence of its contents will be given. If the writing be not produced, pursuant to such notice, the party calling for it, may, after proving it in the hands of the opposite party, give parol evidence of its contents. If the writing be produced, and the party holding it is a party to it, and claims a beneficial interest in it, no proof of its execution is required; but its execution must be proved, as in other cases, when the party producing it is not a party to it, and does not claim such beneficial interest.¹

Where the pleadings in a suit virtually contain a notice to a party to be prepared to produce an instrument, on the trial, (as in an action of trover, for a note, bond or other writing,) no notice as preparatory to the introduction of secondary evidence, is required.²

If the opposite party have the paper, you must, before being entitled to your inferior evidence, give him reasonable notice, either written or oral, to produce it on the trial, unless it appear *that he has it in court*, for then to require previous notice would be idle.³

Form of Notice in Writing to Produce Paper on Trial.

IN JUSTICE'S COURT—*Before D. Gillmore, Justice.*

D. CRUIKSHANK	}
vs.	
WILLIAM JOHNSON.	

SIR: You are required to produce in evidence, on the trial of this cause, a certain [here state the paper,] and all other papers relating to that matter, and or parol evidence will be given of its contents. Dated Utica, June 20, 18 . Yours, , *Plaintiff*.

To WILLIAM JOHNSON, *Defendant*.

The great object of this notice is to draw the party's attention to the paper, by some circumstance or description, and

¹ 17 John. 158.

³ Cowen & Hill's Notes, 1186.

² 13 John. 90; 17 John. 293.

a paper may be described by its *subject matter*, without reference to its date. Thus, in an action to recover moneys under an award of commissioners, a *notice* to the party to produce all letters and papers in his possession, relating to such moneys, was held a sufficient description of letters in his hands, relating to said moneys. The giving of this notice to produce the paper may always be proved by the party or by a third person, as the case may be.¹

The notice to produce writings may be either verbal or written. A verbal notice may be proved by any person who heard it; and a written notice may be proved by a copy kept by the person who delivered the original. And the notice may be proved by the oath, even of a party himself."²

Hearsay Evidence and General Reputation.

It is a general rule, that hearsay evidence, (that is, evidence as to the statements of a third person not a party to the suit,) is not admissible. To this rule are some exceptions.

Where a witness who has formerly been examined in a suit between the same parties, and where the point in issue was the same, is since dead, what he swore on the former trial may be proved by one who heard him. And so, when the witness is kept away from the second trial by the contrivance of the opposite party. A foundation must always be laid for this proof, by showing, in a regular and legal manner, the pendency and trial of the former cause.³ It was held in England that the very words of the deceased or absent witness must be remembered, or his testimony could not be received. But this strictness is repudiated by the American courts. It has been found to be impracticable and absurd. The testimony is, therefore, to be shown in the same way as you would prove any matter of hearsay; by notes, memoranda, or naked recollection of the substance.⁴

¹ Cowen & Hill's Notes, 1183, 4, 1197. ⁴ 1 Phil. Ev. 231; Cowen & Hill's

² 16 John. 193; 5 Cowen, 123.

Notes, 578, 585; 15 Wend. 193.

³ 1 Phil. Ev. 230, 1, and the Notes
of Cowen & Hill, referred to at
these pages.

Minutes of testimony taken by counsel, or by a Judge, on a former trial, can only be resorted to as a memoranda to refresh the memory of a witness testifying to what then took place, and where a person testifying to what was sworn to by a witness on a former occasion, states that he took minutes of the testimony and intended to take down what the witness swore to, and believed he did so, but that he has no remembrance of the witness' testimony, *independent* of his minutes; he cannot be allowed to state the contents of his minutes. It is necessary for him after inspecting his minutes to be able distinctly to recollect the facts, independent of his written memorandum.¹

To prove a pedigree, death, relationship, marriage, whom one married, his number of children, time of marriage, &c., the declarations of members of the family are admissible, as well as descriptions *in wills*, upon monuments, entries in family Bibles and registry books, &c., but in order to make such declarations admissible, as to pedigree, the witness should be connected with the family, or have some personal knowledge of the facts, or have derived his information from persons connected with the family.²

A notice in a newspaper published in this State of the death of a person in Texas is no evidence of his death. In the case of *Fosgate vs. Herkimer Manuf. and Hydraulic Co.*, (9 Barb. p. 295,) Justice Gridley says there must be a new trial, however, on the ground that improper evidence was admitted on the trial. There is no authority for the admission of a newspaper printed at Auburn (where the plaintiffs reside,) as evidence of the death of Walter Fosgate in Texas.

There should have been legitimate evidence of this man's death, and that he died without issue. There was no difficulty in proving the facts, if they were true, by executing a commission and examining the widow of Walter Fosgate.

Hearsay evidence, as applied to the fact of death, is governed by the same rule applicable to any other fact in litigation.³

¹ *Green vs. Brown*, 3 Barb. 119; 5 Wend. 301; 11 Wend. 477.

² *Cowen & Hill's Notes*, 618 to 616; Id. 617 to 620.

³ 12 Barb. 353.

In the case of public officers, as the Sheriff, Deputy Sheriff, Justice, Constable, &c., general reputation is sufficient evidence of their holding the office, without producing their appointment or commission.¹

Admissions and Declarations.

No oath of either party (except by the terms of a recent statute,) upon the merits in controversy, is admissible in evidence, unless the parties agree to allow such evidence. And the Justice has no right to admit evidence of the declarations of either party, in his own favor, to go to the jury, even although he directs the jury to disregard it.²

The admissions of a party are always evidence against him, even though he sue merely as trustee for another, and so is the admission of the person *beneficially interested*, though he be not named as a party in the suit.³

An admission of one of several joint plaintiffs is evidence against all. And the admission of a joint debtor, though not a party to the suit, is evidence against those who are defendants. But the acknowledgment of an account by one partner after a *dissolution* of the partnership will not bind the other. After the dissolution of a partnership, an acknowledgment and promise to pay, made by one of the partners, will not revive a debt against the firm, which is barred by the statute of limitations.⁴

The admission of one is *inadmissible* to prove another his partner. A declaration by a partner, though made during the partnership, that a liability incurred by a third person, at his request, in the *borrowing* of a sum of money, was for the benefit of the firm, is not binding on his copartner. But had a note been given in the partnership name, the rule would be different. Then the burthen would have lain upon the copartner to show that the note was given for the individual debt of the partner who gave it.⁵

¹ 3 John. 431.

² 2 R. S. 174, § 105; 2 Cowen, 436.

³ Cowen & Hill's Notes, 173, 4.

⁴ Van Kenren vs. Parmalee, 2 Comst. 523—The leading cases on this question reviewed, and those of Patterson vs. Choate, (7 Wend.

441,) and Johnson vs. Beardslee, (15 John. 3,) holding a contrary doctrine, and the *dicta* in other cases to the like effect. Overruled (Id.)

⁵ Cowen & Hill's Notes, 173, 4; 21 Wend. 365, and cases cited.

In an action for a mere wrong, as in trover, trespass, or case, against joint wrong-doers, the confession of one defendant, either as to their being joint trespassers or wrong-doers, or any other fact, *is not evidence* against the others, though it is otherwise as to confessions which are accompanied with the wrongful act—*after having first established by evidence* the wrongful combination, for then the act of one is esteemed the act of all; and in an action for a combination, in committing a fraud, the confession of one defendant has been held evidence as to the others, the combination however, *being first proved*. But in trespass, &c., where the acts are entirely distinct and unconnected, as if done or said at a different time or place by one joint trespasser, they are not evidence to enhance the damages, and ought not to be received.¹

These confessions, however, are not conclusive, by any means, but may be done away by proof. A receipt absolute in its terms may be explained or contradicted, so where a party had admitted his promissory note, yet he was allowed to show that his signature was not genuine.²

The acts and admissions of an agent, while acting within the scope of his authority, are evidence against his principal, because they form a part of the contract or transaction itself, but not what he may have said or done at another time. Upon the same principle, the confessions of a deputy sheriff, made while he is acting within the scope of his authority, will bind the sheriff; for instance, what he may say at the time of executing a writ, or concerning the custody of a debtor upon the execution in his hands, or concerning any other execution, while the same is in force in his hands; but these confessions, in order to bind the sheriff, are restricted to the business which the deputy has in hand, while it is going on; and one case, which seems to look a little further than this is overruled. If one refer to another for information on a disputed fact, as authorized to answer for him, or employ an agent to make propositions for him, the

¹ Cowen & Hill, 176.

² 10 Mass. 39.

consequent replies or propositions are evidence against him, the same as his own would be.¹

It may be observed, with regard to admissions generally, that a mere proposition by way of compromise, is not evidence against the party, though the admission of certain articles of charge, in the course of a settlement, or before arbitrators, would be evidence. Whether the offer is merely by way of compromise, must be gathered from the circumstances in proof. The case commonly put is, where A. claims of B. fifty dollars, and B. offers him a gross sum of twenty-five or thirty dollars, or other amount, in order to settle the claim ; this ought not to be received as evidence.² But if B. should tell him it is true I owe you thirty dollars, this is a fact which may be shown.

The admissions of the party are evidence against him, whether made in writing, or by parol, whether before or after the commencement of the suit. And so is the recital of a fact in a deed, executed by the party, or an admission in an answer in chancery.³ And the receipt of a bond and warrant of attorney, stating the particulars thereof, has been held evidence of the bond and warrant, even without producing them.⁴

The whole of a party's answer, confession or admission, must be taken together, in order to show distinctly the full meaning and sense of the party ; as where I say, " True, I received a dollar of the plaintiff, but it was my due ;" " True, I shot the plaintiff's dog, but he assaulted me in the highway ;" these confessions will not sustain an action against me. " True, A. signed the note jointly with me, but he did this as a surety and not as a partner." This is not an admission that A. and I are partners. " I bought the goods, but paid for them ;" this will not sustain an action against me for the goods. If a party, in order to establish a credit in his own favor, show an account made out by the opposite

¹ For these propositions, see 1 Phil. Ev. 99 to 102; also 105, 6, and Cowen and Hill's Notes, 180 to 188 and 191.

² 1 Phil. Ev. 108, 9, and Cow. & Hill's Notes, 218.

³ 1 Phil. Ev. 89, and Cowen & Hill's Notes, 159, 160, 161.

⁴ 14 John. 404.

party, the whole must be taken together, but the party producing it will be at liberty to disprove any of the charges contained in it.¹ "True, I borrowed the money, but repaid it," will not sustain an action against me for money lent. "True, I was captain of the ship, but never employed the plaintiff," will not help in sustaining an action against me for the wages; though it is by no means true that equal weight must be given to what is in favor of the party, with that which makes against him. Of course, the former may be avoided or falsified by other evidence; when the latter will stand alone.²

What a person has sworn to as a witness is evidence against him, even though the questions which he answered were unexceptionable, and he might have demurred to them; and so, what he has confessed as a criminal, under a promise of pardon.³

A large class of declarations made by third persons, and even by the party, are entirely distinguishable from hearsay. I mean such as are made by any one at the time when an act is performed, or is in progress of performance by him. Examples of this are, what a party says when making a contract, or in taking possession of property, or while holding such possession. So, declarations made while doing any business, official or private, whether in the party's own right, or in behalf of another. These make a part of the transaction, *res gestæ*, and are used to show the intent or design of the actor, and the character of the act. To this end they are admissible, not only against, but even for the person who does the act. The instances in the books are very numerous.⁴ Thus, where the state of mind, or disposition of a person at a given period, becomes a pertinent topic of inquiry, his declarations and conversations may be resorted to.⁵ So may the conduct and declarations of a man and woman during their cohabitation, to show whether their intercourse was matri-

¹ 5 Taunt. 245.

² 2 John. Ch. Cas. 90; 1 Phil. Ev. 110, and Cow. & Hill's Notes, 223, 225, 230, 247.

³ 1 Phil. Ev. 89, and Cowen & Hill's Notes, 161, 2, 240.

⁴ See Phil. Ev. 231; Cowen & Hill's Notes, 157, 158, 585 to 606.

⁵ 2 Hill, 248, 257, note (b.)

monial or meretricious ; but their declarations after the intercourse ceased would not be sufficient to repel the presumption of an actual marriage, or to establish the illegitimacy of their children.¹ In like manner, where the president of a bank requested the defendant to pay a note belonging to it, which he insisted had been paid, and they proceeded to examine the books of the bank, when the president declared himself satisfied that it was paid, it was held that the declaration of the president was within the scope of his ordinary powers and part of the *res gestæ*.² And where, in an action by a bank, it became material to show for what purpose a note had been sent to it by a corresponding bank, the letter of the president of the latter inclosing it, it was deemed competent evidence as a part of the transaction.³

The decease of a third person, who has made an entry of a fact in writing, with a view to perpetuate its memory, often renders the entry evidence. This rule extends to a large portion of very important testimony, which is received, after death, in some measure on the ground that it was part of the transaction. It extends to all entries made in the usual course of official and even private business, as entries by deceased notaries public, concerning protests and notices, which is the case usually put as an example of official entry. Among entries relating to private business, it has been applied to those made by attorneys, clerks, surveyors, engineers, runners and messengers of banks, &c. But it does not extend to oral declarations. The entry must be produced, or its absence accounted for. The witness must be shown to have died. His absence beyond the jurisdiction of the court is not enough. In general, the entry must have been made by the deceased person himself ; not by another for him ; though if such were the usual course, and both be dead, the entry is admissible. It must be shown to have been made in the usual course of deceased's duty or business.⁴

1 9 Paige, 611.

2 2 Hill, 445.

3 7 Id. 531.

4 Cowen & Hill's Notes to Phil. Ev
674 to 679.

A party whose admissions or confessions are resorted to as evidence against him has, in general, a right to insist that the whole shall be taken together; but the part called out by him should relate to the point or fact inquired into on the other side.¹

The confessions of a person who, if produced, would be a competent witness, are not admissible.²

Where the plaintiff, previous to the suit, assigns his interest in the demand, and the defendant has notice of the assignment; the confessions of the plaintiff, made subsequent to the assignment, are inadmissible to defeat a recovery.³

The rule is well settled in this State, that the declarations of the owner of a chose in action, are not admissible to affect the rights of one subsequently deriving title from him.⁴

The declarations of the intestate, touching the title to personal property, are evidence against his administrator, but they are not competent evidence against other parties who claim title under the deceased.⁵

The confessions of a party are not admissible to prove the execution of a sealed instrument to which there is a subscribing witness, nor matters of record. And, in a suit brought against a witness for non-attendance before a Justice, the acknowledgment of the witness, that he has been subpoenaed, will not be sufficient; the subpoena must be produced.⁶

An offer of compromise of a contested claim is no evidence of indebtedness, for a man may be willing to buy his peace at a sacrifice; and admissions or concessions made when a treaty of compromise is pending, with reasonable prospect that it will be carried into effect, are not admissible evidence against the party making them.⁷

Where, at the time of delivering promissory notes to a third person, for the benefit of the payee, the maker declares

¹ Kelsey vs. Bush, 2 Hill, 440; 21 Wend. 351.

² 11 John. 185.

³ 20 John. 142.

⁴ 21 Barb. 161; 7 Hill, 361, and cases cited; 18 Barb. 344; 2 Kernan, 118.

⁵ 2 Kernan, 118; Denio J.

⁶ 6 John 9; 10 Id. 248.

⁷ Phil. 78; 8 Cowen, 201

the delivery to be unconditional, such declaration is a part of the *res gestæ*, and makes the act of delivery absolute.¹

Books of Account in Evidence.

The cause in which the admissibility of a party's books as evidence in his favor, was established and restricted, originated in a Justices' Court, where this species of evidence is much oftener introduced than before any other tribunal.

Thayer sued Vosburgh (12 John. 462,) before a Justice, for butcher's meat, furnished by him to Vosburgh's family. Thayer proved 1. That he had been in the daily practice of supplying Vosburgh and his family with meat during the period for which he claimed payment. 2. He proved by some of those who had dealt with him, that he kept just and honest books of account. 3. That he had no clerk. He then offered his books of account in evidence, which were objected to by the defendant, Vosburgh, but admitted by the Justice, who gave judgment for the plaintiff, Thayer. Vosburgh removed the cause by *certiorari* to the Supreme Court, where the judgment was affirmed, and the following restrictions laid, within which, all account books, without regard to the particular employment of the party keeping them, are made evidence in his favor.

I. The charges to be proved must be such as are *matter of book account*. A book, therefore, would not be evidence of money lent, had and received, or paid, laid out, and expended, for the use of the opposite party.

II. They are not evidence of a single charge, because there exists, in such case, no regular dealings between the parties.

III. They are not to be admitted, where there are several charges, unless a foundation is *first laid for their admission, by proving*:

1. *That the party had no clerk.*
2. *That some of the articles charged had been delivered.*
3. *That the books produced are the account books of the party.*

¹ 4 Barbour, 304.

4. *He must prove by those who have dealt and settled with him, that he keeps fair and honest accounts.*

Under these restrictions, the yare evidence to be left to the court or jury.

Questions on this species of evidence have rarely come under review of the Supreme Court since the above decision; the instances in which they have, however, should hold a prominent place in a book designed to instruct Justices of the Peace. I shall therefore, refer to them in order to show in what manner the Supreme Court view this species of evidence.

In this State, this kind of evidence is not restricted to any particular sort of business or occupation. It is common to the merchant, mechanic or farmer.¹

It seems to be no objection that part of the entries are made by the party, and part by a clerk, though *quere* whether the book would then be evidence *as such* beyond the entries made by the party, and if the party have a clerk, the necessity which sanctions it even so far seems to be wanting. *Vosburgh vs. Thayer* holds that he must have no clerk, and we shall see that this sort of evidence is, in general, considered as secondary, and not receivable when direct proof may be had through others.²

Independent proof by a mechanic of two of the items charged in his book, *was held* to satisfy the second requisition of *Vosburgh vs. Thayer*.³

The oath of a clerk that he believes his entries to be true, though he has lost all personal recollection of having delivered the goods charged, makes the books evidence as original entries. But this is common law evidence. The cases here cited, hold that to warrant books in evidence, as those of the party, they must be his general books of daily account, not mere memoranda or check rolls, made up as mementos of other's labor in the work done by the party producing them for his adversary.⁴

Also that the entries of work done, must be for such as is

¹ 6 Wend. 407, 9; 29 Id. 75.

² 4 Wend. 483; 20 Wend. 74, 5.

³ 11 Wend. 568.

⁴ 4 Wend. 30, *Savage, C. J.*; 20 Id.

75; 16 Id. 595.

done in the ordinary course, and not of charges on a *quantum meruit*, or for work done on a special contract, though the opposite party, by violating the contract, may have become legally liable to be charged in that form.¹

When the jurors are convinced that any one entry made by the party in the particular account is wilfully false the whole book *should be rejected*.

Entries must be daily, and particularly made, as the work progresses, or the goods are delivered, not by lumping several days together, or charging a round sum, as for a job, or at so many days.²

The entries must be made at or near the time of the transaction; they should be memoranda of transactions as they occur, but the proximity of time must depend on the course of business. The party may first enter his accounts on a slate, and afterwards transcribe them into his book; if such be his ordinary course in making his entries, such accounts should in general be entered in his book daily. The entry must be in the book of the party, kept as his daily account book with those who deal with him, and charged promiscuously along as they occur; the book must contain the original entry made by the party himself and not by another, though this would be excused if he *could not write himself*.

They may be kept in form of an ordinary journal, or day book, or *ledger wise*, i. e., where the account of each man dealing with the party is kept by itself. Erasures and interlineations go much to discredit the book; they are open, however, to explanation, and do not necessarily render the book incompetent evidence.

If the day-book appear to be posted, the ledger *must* be produced as that may show payments. Books are evidence of the items, sale and delivery of goods, services done, materials found, and retained to do the service, together with the price carried out respectively; the book, however, like a confession, is to be taken altogether, with its charges and credits; and it is the peculiar province of a court or jury

¹ 16 Wend. 594.

² 2 Cow. Tr. 422.

to examine the books of a party carefully, and give them such weight and credit as they honestly believe from all the circumstances they are justly entitled to, always remembering that it is easy for a party keeping the books to make false charges against his opponent, and thus prejudice his rights.

In the case of *Larue vs. Rowland*, (7 Barbour, 107,) Justice Harris delivered the following able opinion on the subject of receiving books of account as evidence. He says: Books of account are received in evidence only upon the presumption that no other proof exists. They are justly regarded as the weakest and most suspicious kind of evidence. The admission of them at all, is a violation of one of the first principles of the law of evidence, which is, that a party shall not himself make evidence in his own favor. The practice of admitting such evidence is, I believe, universally adopted. It is said that it has its origin in a kind of "moral necessity," and that such is the general course of business, that no proof would be furnished of the frequent small transactions between men without resorting to the entries which they themselves have made in form of accounts. The practice can only be justified upon the ground that, without such evidence there would in many cases be a total failure of proof. It may be added that it has been often doubted, by those, too, who have had the best opportunities for observing the facilities for frauds which this loose species of evidence affords, and the abuses which in inferior courts have been perpetrated under it, whether it would not have been more wise to have excluded such evidence altogether. At the very best it is but presumptive evidence, and that, too, of the lowest grade. It should always be received with extreme caution, and be subjected to the strictest scrutiny. The common law did reject it altogether. In countries where the civil law prevails, books of account are generally received in evidence, in connection with the oath of the party. But to make them evidence at all, the books must have been kept in a manner so cautious as in a great degree to furnish a guarantee against abuse. In many, perhaps most of the United States, what is called the suppletory oath of the party is required. In this State that practice has not obtained; and I

agree with Justice Cowen, that, frail as such proofs must be, the law can hardly be censured for thinking they would be but little fortified by the suppletory oath of an interested and excited party. (See *Sickles vs. Mather*, 20 Wend. 72, Cowen & Hill's Notes, 682.) Notwithstanding what I have said, I admit the necessity which receives this species of evidence.

In a country like ours, where the artisan and tradesman are compelled by the usages which have obtained to give credits to their customers, and yet in very many instances cannot afford to keep clerks, the customary entries made in the usual course of business, must, to prevent greater injustice, and when free from all suspicion of dishonesty and unfairness, be received as evidence of the transactions to which they relate. All I claim is, that the true character of the evidence should be appreciated. The general rules which experience has suggested as safeguards against dishonest practices are, that the evidence should only be received upon preliminary proof that the books offered contain original entries made by the party himself; that they are fairly kept; that the party had no clerk, and had dealings with the person charged. These are questions upon which evidence is to be addressed *to the Court*, to enable it to determine whether the books of account shall be received as evidence at all. So also fraudulent circumstances may be proved for the purpose of rendering the evidence incompetent. Thus it may be shown that material and gross alterations have been made, or that entries have been made *post litem motam*, and even that they were not made at or near the time of the transaction. In short, anything may be proved which will show that the books are unworthy of credit, and if the proof sustains the objection it is the duty of the Court to reject the evidence as incompetent, and leave the party to his common law proof. (*Coggswell vs. Dolliver*, 2 Mass. Rep. 217; *Eastman vs. Molton*, 3 New Hampshire Rep. 156.) In the light of these principles, let us advert to the facts of the case under consideration. The defendant, to establish his set-off, offered his books of account

as evidence. He gave what, in the first instance, should perhaps be considered sufficient preliminary proof.

The books offered were a *day-book* and a *ledger*, and upon inspection it appeared that the entries in the *day-book* were of a date several years anterior to the time of the trial, and that the defendant had another book containing entries of a later date, in which his account with the plaintiff was continued. The *ledger* showed one item posted from this second *day-book* to the plaintiff's account. The plaintiff alleged that the second *day-book*, if produced, would be found to contain credits varying the account in his favor. The defendant denied that he had such second *day-book*, but, besides the evidence of the *ledger* itself, one of his own witnesses with whom he had settled an account from the very book was recalled and proved its existence beyond all question. Under these circumstances the Justice was undoubtedly called upon to reject the books as incompetent. If the account had been paid, or if the plaintiff was entitled to credits applicable to the account, they would have been most likely to have been found entered in the books at a later date than the charges. (In *Prince vs. Swett*, 2 Mass. R. 569,) a *day-book* was offered in evidence to prove an account for goods sold and delivered. When produced, it appeared from the postmarks upon it that the account had been posted to a *ledger*. The court held that it was necessary to produce the *ledger* as well as the *day-book*, that the other party might have the advantage of any items entered in it to his credit. The existence of the second *day-book* in this case was proved. The defendant did not pretend that he was unable to produce it. It is a just rule of evidence that where a demand is made upon a party to produce his books of original entries, and he refuses, without assigning a satisfactory reason for it, everything is to be presumed against him which the nature of the transaction will warrant.

I cannot see what is to exempt the defendant from the operation of this rule. He was required to produce a book of original entries. He refused, and gave no excuse for it. The book might well have contained credits to the plaintiff sufficient to balance the account. There is some reason to

believe from what occurred upon the trial that it did in fact contain such credits. The Justice, therefore, erred in allowing the books to go to the jury as evidence to establish the defendant's account against the plaintiff. Besides, I think the evidence should have been excluded upon another principle. Books of account, to some extent, partake of the nature of documentary evidence, in respect to which it is a cardinal rule, that part of an instrument cannot be received while a part is withheld. The whole must be taken together. So I think it is with regard to books of account. All the books containing entries relating to the account, where relied upon as furnishing evidence to sustain the account, should be produced. A party should no more be allowed to withhold a part of the account while he avails himself of another part as evidence in his favor, than a part only of a deed or other document should be received in evidence. The fact that the account ran into two books cannot vary the principle. It is the same in legal effect as though the defendant had insisted upon sealing up one half of the day-book he offered in evidence in his favor.

The only proper or safe rule to apply in such a case is that if a party, in derogation of the fundamental and salutary rule of evidence, that one shall not be permitted to make testimony for himself, seeks to introduce his own entries in his own books, as evidence of the dealings to which they relate, he shall, at least, allow the party to be affected by such evidence, the benefit of *all* the entries he has made. Common fairness demands it. Upon this ground, also, the books should have been excluded. For these reasons, the judgment below should be reversed.

A party who relies upon the account books of his adversary to prove items in his own favor, must also take the books as evidence of the charges against him. The account books of a party are not evidence, in his own favor to prove charges for cash *lent* to his adversary.¹

The books of account kept by a bank are not themselves

¹ Low vs. Paine, 4 Comstock, 247.

evidence against its customers of the facts indicated by their entries.

A check, drawn upon and paid by a bank, is not evidence of indebtedness of the drawer to the bank. The legal presumption is that it was drawn against funds of the drawer.¹

The entries made by the officers of a bank in the pass-book, kept between the bank and its customer, are the customer's vouchers for payments, deposits and other transactions with the bank. They are made by the bank and delivered to the customer for his safety, and as written evidence of the facts appearing by the entries. When a customer, having deposits in a bank, credited on his pass-book, is charged with his note, the charge is an appropriation by the bank of so much of its customer's money in payment and satisfaction of the note. It extinguishes the debt, and the note is thenceforth *functus officio*. As against a subsequent holder of the note who acquires it after due, it is equivalent to a receipt in full by the bank, indorsed on the note, subsequent holder being chargeable with notice of the entries existing between the bank and the previous parties.²

If a defendant relies upon his credits in the plaintiff's account, he cannot object to cash charges and charges for due bill, charged in the account on the book. The rule is, that if a party makes the books of his adversary evidence in his favor to prove his credits, he is bound to take the whole account together, and to admit the whole of the debit side of the account; and the rule is the same whether the books are produced by the plaintiff or the defendant.³

Who are Competent Witnesses.

The incompetency of witnesses arises, 1st, from want of understanding; 2d, from defect of religious principle; 3d, from infamy of character; 4th, from interest; 5th, from the relation of attorney, solicitor, or counsel and client; also, that of physician, surgeon and patient, &c. This question of *competency* belongs exclusively to the Justice; as the

¹ 4 Selden, 170.

³ 22 Barbour, 147, and cases cited.

² 2 Selden, 276.

question of *credibility* does to the jury, (or Justice sitting in their stead,) after the witness is sworn. If the witness be *incompetent*, he cannot be sworn; if he be *incredible*, he is not to be believed when sworn.

Persons insane, idiots and lunatics, under the influence of their malady, are incompetent, though if they enjoy lucid intervals, they may testify during such intervals, if they appear to have sufficient reason. Even a person born deaf and dumb, may, if he appear to have sufficient understanding, give evidence through an interpreter by signs. Though, if he can write, this is the more certain mode. A person in a state of intoxication is incompetent, and the Justice may determine the question of his competency by inspection.¹

Children, who do not understand the moral obligation of an oath, cannot be examined. But if they do understand such obligation, they may be sworn at any age over four years. If capable of distinguishing between good and evil, they may generally be sworn; and if the child appear to have good sense, but not to understand his duty when sworn, he may be instructed by the Justice, or some judicious person appointed by him. This may be done on the spot, and in the meantime, the trial may be suspended.² Though in one case, where the child manifested a total want of all religious instruction, Patterson, J., held that mere instruction by a clergyman, for the purpose of rendering her competent, would not have that effect.³

Witnesses may be examined as to the competency of a lunatic, &c., though the usual and most satisfactory mode is, by the inspection and examination of the witness himself.⁴ The latter is the true course in testing the capacity of infants. The party objecting may insist on this; and it is no answer that the Justice has before examined the witness privately, and so is satisfied of his capacity.

The Revised Statutes provide that every person who believes in the existence of a Supreme Being, who will punish

1 1 Phil. Ev. 18, 19, and Notes by Cowen & Hill, 60, 61. 3 Cowen & Hill's Notes to Phil. Ev. 1502.

2 Id 19, and Notes by Cowen & Hill, 61. 4 10 John. 362; 16 Id. 148.

false swearing, may be sworn as a witness. Thus, a *Jew*, *Mahometan*, *Gentoo*, and infidel of any country, may be witnesses, and one who believes that moral punishment for sin is confined to this world, is clearly admissible. But atheists, and such infidels as profess not any religion, natural or revealed, that can bind their consciences to speak the truth, are excluded from being witnesses.¹

The statute provides that, [§ 88.] No person shall be required to declare his belief in the existence of a Supreme Being, or that he will punish false swearing, or his belief or disbelief of any other matter, as a requisite to his admission to be sworn or to testify in any case. But the belief or unbelief of every person offered as a witness, may be proved by other and competent testimony.

§ 89. But the last section shall not be construed to prevent any court before whom an infant, or a person apparently of weak intellect, shall be produced as a witness, from examining such person to ascertain his capacity, and the extent of his religious and other knowledge; nor shall it be construed to prevent a court from inquiring of any person what are the peculiar ceremonies observed by him in swearing, which he deems most obligatory.²

But if an adult has recently and deliberately declared such defect in his belief as would exclude him, it may be shown by other witnesses; though it is competent to show that he has conscientiously changed such belief, and thereby restore his competency. But he cannot be called upon at the trial to recant his former opinion, or deny the declarations proved against him.

The statutes prescribe the method of administering oaths as follows:³

§ 82. The usual mode of administering oath now practiced, by the person who swears, laying his hand upon and kissing the gospels, shall be observed in all cases in which an oath may be administered according to law, except in the cases hereinafter otherwise provided.

¹ 17 Wend. 460.

³ 2 R. S. 408, [4th ed. p. 658.]

² 2 R. S. 408, § 89, [4th ed. p. 654;]

21 Wend. 808.

§ 83. Every person who shall desire it, shall be permitted to swear in the following form: "You do swear in the presence of the ever living God;" and while so swearing, such person may or may not hold up his hand, in his discretion.

§ 84. Every person who shall declare that he has conscientious scruples against taking any oath, or swearing in any form, shall be permitted to make his solemn declaration or affirmation in the following form: "You do solemnly, sincerely and truly, declare and affirm."

§ 85. Whenever the court before which any person shall be offered as a witness shall be satisfied that such person has any peculiar mode of swearing connected with or in addition to the laying of his hand upon the gospels and kissing the same, which is more solemn and obligatory in the opinion of such person, the court may in its discretion, adopt such mode of swearing such person.

§ 86. Every person believing in any other than the Christian religion, shall be sworn according to the peculiar ceremonies of his religion, if there be any such ceremonies, instead of any of the modes herein before prescribed.

Any form elected by the witness is binding, whether it in fact accord with his conscience or not; and if he swear false, he is indictable for perjury.¹

The mode in which the witness is sworn, is to be gathered from him on his own suggestion or on his examination before swearing him.

When a man is sentenced for a felony, he is incompetent; but not by reason of sentence for any other crime.² A pardon restores his competency, unless the conviction were for perjury or subornation of perjury.³ The definition of felony is, any offence punishable by death, or by imprisonment in the state prison.⁴

One convicted of and sentenced for the crime of burglary in the third degree, is thereby rendered incompetent as a witness in any cause, civil or criminal, although at the time

¹ Cowen & Hill's Notes to Phil. Ev. ³ Id. and see 2 R. S. 681, § 1, sub. 3 and § 4, [4th ed. p. 865.]

² 2 R. S. 701, § 23, [4th ed. p. 885.] ⁴ Id. 702, § 31. [4th ed. p. 886.]

he was under sixteen years of age and sent to the house of refuge and not to the state prison.¹

The definition of *felony* must be construed as relating to the punishment prescribed for the crime, without reference to any personal exemption.

No sentence upon a conviction for any offence other than felony, shall disqualify or render any person incompetent to be sworn or to testify in any cause, matter or proceeding, civil or criminal. (§§ 23 and 30, Title 7, Chap. 1 of Part 4, R. S.) When a witness is objected to on account of his having committed a crime, he is not to be inquired of as to his criminality ; the record of his conviction must be produced.²

At the common law, parties to an action were not competent witnesses, and neither party could compel his opponent to testify, nor would one of the two plaintiffs or defendants be permitted to testify either for or against his co-plaintiff or co-defendant without the consent of all the parties.³ The following provisions of the Code of Procedure have superseded the ancient rules in relation to that subject :

“ § 390. A party to an action may be examined as a witness at the instance of the adverse party or of any one of several adverse parties, and for that purpose may be compelled in the same manner, and subject to the same rules of examination as any other witness, to testify either at the trial or conditionally, or upon commission.

“ § 393. The examination of the party thus taken, may be rebutted by adverse testimony.

“ § 394. If a party refuse to attend and testify as in the last four sections provided, he may be punished as for a contempt, and his complaint, answer or reply may be stricken out.

“ § 395. A party examined by an adverse party, as in this chapter provided, may be examined on his own behalf in respect to any matter pertinent to the issue. But if he testify to any new matter not responsive to the inquiries put to

¹ The People vs. Higgins, 41 N. Y. 21; 23 N. Y. 252.

² 2 R. S. 585; 13 John. 82; 14 Id. 182.

³ Cowen & Hill's Notes, 135, 136, 163.

him by the adverse party, or necessary to explain or qualify his answers thereto, or discharge when his answers would charge himself, such adverse party may offer himself as a witness on his own behalf in respect to such new matter, subject to the same rules of examination as other witnesses and shall be so received.

“§ 396. A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined a witness in the same manner and subject to the same rules of examination as if he were named as a party.

“§ 397. A party may be examined on behalf of his co-plaintiff or of a co-defendant as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment can be rendered. And he may be compelled to attend in the same manner as at the instance of an adverse party, but the examination thus taken shall not be used in behalf of the party examined. And whenever, in the case mentioned in section three hundred and ninety and three hundred and ninety-one, one of several plaintiffs or defendants who are joint contractors or are united in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer himself as a witness to the same cause of action or defence, and shall be so received.”

In order to compel the opposite party to appear and testify in a cause, he must be served with a subpoena in the same manner as any other witness, and in addition to the same remedies against him for not appearing, he may be further punished by having his complaint or answer struck out, which will, if he be the plaintiff, have the effect to nonsuit him, and if he be the defendant, prevent him from introducing any defence to the case the plaintiff makes against him.

The provisions contained in §§ 393, 394 and 395, are intended to obviate the difficulties which otherwise might have arisen from the permission to call on an opponent to testify. In the first place, the party calling him is not concluded by his testimony. Ordinarily a party cannot contra-

dict his own witness as to any material fact, but when he has called his opponent, he may give other evidence to rebut the testimony which the latter gives, even upon the points to which he has been examined. And indeed, if not contradicted, he is not absolutely concluded by it, for the court is not bound to give credit to it, and may disregard it.¹ Secondly, the party called as a witness may testify on his own behalf to anything material to the issue, but if he does, and he testify to any new matter, he will thereby authorize the party calling him to be sworn as a witness on his own behalf in respect thereto. The rule will not permit the party calling him to testify generally on his own behalf, but only as to the new matter to which the party first called has testified in his behalf. And the examination on behalf of the plaintiff of a defendant not served with process, who testifies to new matter, will not authorize the plaintiff to offer himself as a witness.²

Under the 397th section of the Code of Procedure, the Court of Appeals, in June term, 1854, held that in an action for tort against several defendants, each of them might be called by his co-defendants as a witness, overruling a former decision of the Supreme Court.³ In an action upon a joint and several bond, each of the joint obligors is a competent witness for the other.⁴

At the common law a husband cannot be a witness for or against his wife, nor a wife for or against her husband, except in criminal prosecutions, where personal violence has been committed by one against the other; and in all cases where the husband was incompetent by reason of interest to testify in an action his wife was.⁵ *This rule has been changed by statute as follows:*⁶

§ 1. In any trial or inquiry in any suit, action, or proceedings in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear

¹ 15 Barbour, 449.

² 14 Barbour, 118.

³ 10 Barb. 112; 1 Kernan, 128, (as to what matters he may give evidence discussed.)

⁴ 4 Sand. 616.

⁵ Cowen & Hill's Notes to Phil. Ev. 125.

⁶ Sess. Laws, 1867, chap. 887.

evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action, or proceeding is brought, prosecuted, opposed, or defended, shall, except as hereinafter stated, be competent and compellable to give evidence the same as any other witness on behalf of any party to such suit, action, or proceeding.

§ 2. Nothing herein contained shall render any husband or wife competent or compellable to give evidence for or against the other in any criminal action or proceeding, (except to prove the fact of marriage in case of bigamy,) or in any action or proceeding instituted in consequence of adultery, or in any action or proceeding for divorce on account of adultery, (*except to prove the fact of marriage,*) or in any action or proceeding for or on account of criminal conversation.

§ 3. No husband or wife shall be compellable to disclose any confidential communications made by one to the other during their marriage.

By the 398th section of the Code, no interest disqualifies a witness. The section reads as follows:

§ 398. [351.] (Am'd, 1869.) *No witness to be excluded by reason of interest.*

No person offered as a witness in any action or proceeding in any court, or before any officer acting judicially, shall be excluded by reason of his interest in the event of the action or proceeding, or because he is a party thereto, except as is provided in the next following section of this act. Nothing contained in the eighth section of this act shall be held or construed to affect or limit the operation of this or the next following section.

§ 399. [352.] (Am'd, 1851. 1857, 1858, 1859, 1860, 1862, 1863, 1865, 1866, 1867, 1869.) *Examination of co-plaintiff or co-defendant.*

No party to an action or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party or interested person derives any interest or title, by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the

time of such examination deceased, insane or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such deceased person, or the assignee or committee of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor or committee shall be examined in his own behalf, or as to which the testimony of such deceased person or lunatic shall be given in evidence.

The following sections of the Code apply to Justices' Court, viz :

Entitling Affidavits.

SECTION 406. Affidavits defectively entitled, valid.

§ 406. [367.] *Affidavits defectively entitled.*

It shall not be necessary to entitle an affidavit in the action ; but an affidavit made without a title, or with a defective title, shall be as valid and effectual, for every purpose, as if it were duly entitled, if it intelligibly refer to the action or proceeding in which it is made.

CHAPTER X.

Computation of Time.

SECTION 407. Time how computed.

§ 407. [368.] *Time, how computed.*

The time within which an act is to be done, as herein provided, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded.

Our courts have long been desirous of arriving to the period of time when all the technical objections raised to the admission of witnesses in courts of Justice, on account of interest, should be done away, and every person, whether a *party*, or in any way interested, should be permitted to give evidence of any matter pertinent to the issue, and have his testimony, with all his interest, bias and prejudice weighed

in the scales of justice, with the other testimony given in the action. That period has now arrived, and an opportunity given to parties to come before the court and jury, make their own statements in relation to the subject matter of difference between them, their appearance, their apparent sincerity, the probability of the truth of their statements, and the confidence they are entitled to, being proper and legitimate subjects of consideration in passing upon and arriving at a conclusion upon their testimony, and it would seem as probable that a court or jury could arrive at as safe a conclusion in this way as any one that could be devised.

As a fair illustration of the rule in weighing testimony I will adopt the language of Chief Justice Pennington, where he says :

“ The circumstances of the case, the probable or improbable nature of the facts detailed, the character of the witness, the manner of his giving testimony, must all be taken into consideration, and ought, after being duly weighed, to carry conviction to the mind of the jury, before they give it an effect by their verdict. It is common for jurymen to say, in excuse for giving a wrong verdict, that they believed it was wrong, but how could they do otherwise. The facts were sworn to, it was the fault of the witness not theirs. This practice of jurors’ loading on the witness their own sins, and making him a scape goat for the whole, is grossly improper. It is true that jurors cannot, nor ought they to substitute, in the place of proof, their own fancies, conjectures, or prepossessions, much less to suffer their passions, inclinations or biases, to come in aid of proof, but are to govern themselves by the testimony given in the cause. But should a witness relate a fact, which from its improbable nature, or from the badness of the character of the witness, taken together with other circumstances in the cause, on due consideration, doth not carry a belief of the fact home to the minds of the jury, but on the other hand, they believe that what the witness hath related is false ; in that case, what he hath said is no evidence to them, and they are not bound to give any weight to it ; but on the contrary, if they act upon it, or rather

make up their verdict on it, such conduct is a departure from their duty, and little short of a violation of their oaths.

“After all the evidence is given in a cause, it frequently happens that the mind is in doubt. If the testimony is contradictory, it should be reconciled if possible; if it is not susceptible of reconciliation it must be weighed by a sound discretion, and determined as one or the other preponderates. If, after all, the mind is balanced, I think it a reasonable rule, (though I do not recollect any where seeing it laid down,) that it must be determined against the party that hath the affirmative side of the question, as having failed to make out what he has undertaken to do.” (Vid. Pennington on Small Causes, 162, 3.)

The foregoing remarks in relation to witnesses will apply with much greater force, if possible, to *parties*, who must always feel a deep interest in the event of the action.

The objection to a witness for incompetency is made either before he is sworn in chief, or after he is so sworn; or it may be made both before and after he is so sworn. It must, in each case, be proved by the party who raises it, for the presumption is in favor of the witness' competency until the contrary appear, either by the statement of the party offering him, or in some other way. And being once shown, it must be clearly removed, in order to render him admissible.¹ The question, like all others, as to the admissibility of evidence, must be decided by the court, and the evidence on the point cannot be submitted to the jury. The court is the trier; nor will his decision be reversed merely because he happens to decide against the weight of evidence.² The more direct, clear, and safe mode of raising the point in a Justices' Court is by objecting to the witness before he is sworn in chief. This makes a distinct collateral issue, determinable by the Justice alone, whether there be a jury or not, on evidence receivable under a peculiar form of oath, called the *voir dire*, and under rules peculiar to itself. Upon this issue the state of the pleadings, and the evidence and statements of the opposite party in court, so far as they have already appeared

¹ Cowen & Hill's Notes, 1543.

² Id. 58, 1501.

in the cause, and are relevant to the question, may be considered.

A party against whom a person is offered as a witness has a right to have the preliminary oath, called *voir dire*, administered to him, and to examine him touching his competency before he is sworn in chief. It is not within the discretion of the court to decline to administer the preliminary oath to the proposed witness in the first instance, or to refuse to permit the adverse party to show his incompetency until after he is sworn and examined in chief. Although he is sworn in chief without objection, if during his examination it appear that he is incompetent, the objection is in season.¹

If the party making the objection elect to examine the witness on the *voir dire*, the oath may be administered thus:

"You do swear, in the presence of Almighty God, that you will true answers make to such questions as may be put to you, touching any interest you may have in the event of the present suit."

If the party elect to call other witnesses to prove the interest they may be sworn thus:

"You do swear, in presence of Almighty God, that you will true answers make to such questions as may be put to you, touching the interest of John Doe, (the witness offered and objected to,) in the event of the present suit."

If a witness, on being produced, shall be objected to as incompetent, such objection shall be tried and determined by the Justice. Evidence may be given in support of, or against such objection, as in other cases; or the proposed witness may be examined on oath, by the party objecting, and if so examined no other testimony shall be received from either party as to the competency of such witness.²

The books and cases are clear that you may, in your election, omit the preliminary objection, and stake the exclusion of the witness on such testimony as you can obtain under the ordinary rules, on *general* examinations in the course of the trial. In such case, too, it is held that you may object at any time before the testimony is closed; and this course

¹ Seely vs. Engell, 3 Kernan, 542.

² R. S. 174, § 107.

is even recommended by Mr. Phillips, inasmuch as the preliminary examination must generally be to the same effect as that in chief. Here all the rules as to primary and secondary evidence apply, and it is said that if the interest of the witness be shown independently of his testimony, he cannot be examined to remove it, though other witnesses may be. However, if his interest appears from his own examination, he may be cross-examined to facts, to show that it has been removed.¹

If a plaintiff join several defendants in an action for a wrong against any part of whom he gives *no evidence*, the Justice may acquit them, or the jury, if there be one, may do so, under his direction at any stage of the cause, after the plaintiff shall have closed his evidence.²

Of Privileged Communications.

The communications of a client to his attorney, solicitor or counsel, are held inviolable in courts of justice, and can never be disclosed in evidence, either in the cause in which they are made, or in any other cause, even between third persons, though after the relation of attorney, &c., and client has ceased to exist. In a word, the mouth of the attorney, solicitor or counsel is shut forever on this head, nor can they be compelled to produce papers which have been committed to them as professional men. But communications thus sacred, are those only which are made during the relation of which we are speaking, and not those made to a professional man who is not retained in the business to which they relate, however confidential they may be. This is the privilege of the party or the client, and he alone can waive it. At common law, it was confined to persons of the legal profession, and did not extend to medical men, clergymen and others, who are compelled to testify to whatever they learned in the course of their professions, with whatever obligations of confidence and secrecy their information might have been attended. The rule which protects professional communications of

¹ 7 Wend. 180; 1 Cowen R. 518.

² Cow. & Hill, 142; 18 Wend. 142, 3;
3 Hill, 104.

clients to their attorneys or counsel from disclosure should only be held to extend to such communications as have relation to some suit or other judicial proceeding, either existing or anticipated.¹

By the Revised Statutes, physicians, surgeons and clergymen are put on the same footing with counsellors and attorneys.² They are as follows :

“ § 72. No minister of the gospel, or priest of any denomination whatever, shall be allowed to disclose any confessions made to him in his professional character in the course of discipline enjoined by the rules or practice of such denomination.

“ § 73. No person duly authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon.”

These are bound to testify as to facts which they learned before being addressed in their professional character, or after their duties as such have ceased ; as if an attorney had been a subscribing witness, or was knowing to an erasure in a deed, which comes in question in a cause in which he is afterwards retained ; or the client voluntarily communicate facts after the attorney is through with the business, and his functions have ceased. An attorney has also been examined as to the question whether a note put into his hands was endorsed or not ; and he may be compelled to swear to the existence of a paper, and that it is in his hands, so as to let in inferior proof of its contents, if it be not produced on notice from the opposite party ; or to show that it is in court, to let in such inferior proof, upon a short notice, given upon the trial, to produce it. The rule also prohibits a clerk or student at law from being a witness to facts which he learned while in the office of the attorney with whom he is pursuing his professional studies. It also extends to the agent of an attorney, and an interpreter between him and

¹ Whiting vs. Barney, 30 N. Y. 330, ² R. S. 406, §§ 72, 73 ; [4th ed. p. 652.] and numerous cases cited.

his client. The whole current of decisions appears to confine this privilege strictly to the relation between men of the legal profession and their clients ; and it would seem clear that a man employed in conducting a suit before a justice or elsewhere, who has no regular license to practice in any of our Courts of Record, and not acting as a regular clerk or student of one having such a license, is bound to disclose, under oath, the communication of his employer.¹

A physician consulted as to the means of doing an unlawful act, as of procuring an abortion, is not excused by the statute from answering.²

It appears now to be the settled doctrine of the courts of this state, that words spoken or written in a judicial proceeding by any person (attorney or party) having a duty to discharge, or an interest to protect in respect to such proceedings, are absolutely privileged, and no action will lie for such speaking or writing, however false, defamatory or malicious may be the words, providing the matter was material to the issue or inquiry before the court.³

When the facts are disclosed it is for the court and not the witness to decide whether he is privileged or not.⁴

Of the Examination of Witnesses.

The form of the general oath has been heretofore given by the statute.⁵ When a witness is ignorant of the English language, he must be sworn and examined through an interpreter, who must be sworn as follows :

“ You do swear that you will truly interpret between the court, the jury, and the witness, A. B. in this cause, between C. plaintiff, and D. defendant.”

If the Justice sit alone, omit the words “ *the jury.*” The oath is then administered, and interpreted by the sworn interpreter, and the questions put, and answers received, are also interpreted in the same way. This course is also neces-

¹ Phil. Ev. 140 to 147, and Cowen & Hill's Notes, 275 to 288, 1571 to 1574.

² 21 Wend. 79.

³ Marsh v. Elworth, et al. 36 How. 532, and cases cited.

⁴ 1 Hill, 83.

⁵ 2 R. S. 407, § 82 ; [4th ed. p. 653.]

sary where a deaf and dumb person is to testify by signs ; and where a witness can understand what is said, but talks so very indistinctly as not to be understood, except by some familiar acquaintance, an interpreter must also be sworn in the same form, in order to expound the answers.¹

Witnesses may, in the discretion of the Justice, be examined separately, those not on examination being directed to withdraw. This is sometimes advisable ; and if a witness ordered to withdraw wilfully disobey, or return without proper cause, he may be rejected as incompetent. This rule ought not, however, to be applied where the witness is an agent or advocate engaged in conducting the suit. Indeed, the rejection or not, is mere matter of discretion ; and unless the return of the witness present a gross case of wilful disobedience, he should be received.²

When the witness has been regularly sworn, he is first to be examined by the party calling him, which is called an examination *in chief*, after which the other party is at liberty to *cross-examine* him, when the party who called may *re-examine*, and so alternately until the questions are exhausted. The examination is in open court, in presence of the parties and their counsel, the justice and jury, (if there be one,) who have thus an opportunity of observing the understanding, demeanor and inclination of the witnesses.³

Leading questions, that is, such as instruct a witness how to answer on material points, are not allowed, in general, on an examination in chief ; for to direct witnesses in their evidence would only serve to strengthen the bias, which they are usually too much disposed to feel in favor of the party who calls them. Thus : *Did you see the defendant driving away the plaintiff's cow ? Was this on the 5th of May ? Is that cow worth \$25 ? Did the defendant say he owed the plaintiff \$25 ? Did the defendant say he owed the plaintiff fifty dollars, or how much did he say ?* And other questions containing in themselves, the *place, quantity, time, kind,*

¹ Cow. & Hill's Notes to Phil. Ev. 706, 718. ² Phil. Ev. 268, and Cowen & Hill's Notes, 720, et seq.

³ 1 Phil. Ev. 268.

price, or other thing sought for in proof, are leading questions which ought never, without substantial reason, to be put to a witness. If, however, the Justice finds, on pursuing the examination, that the witness is backward or reluctant in the answers he gives, and is, in a word, what is called an unwilling witness, he may then suffer the party to change his ground, and put leading questions, and, indeed, allow all the latitude of a cross-examination. And in examining a witness to contradict directly some particular stated by the witness on the other side, a leading question may be put on examination in chief.¹

A witness cannot be compelled, (though he may do this if he pleases,) to answer any question which will expose or tend to expose him to any charge of crime or misdemeanor, or to any penalty or forfeiture.² And if the court see that, by any possibility, the answer may form the least link in the chain of proof to convict a witness of a criminal offence, it will not compel him to answer. This, however, is the privilege of the witness only, and he may waive it and answer the question. A very striking illustration of this rule is given in an action by the *indorsee* against the *drawer* of a bill of exchange, in which the defence was usury. One Taylor, who appeared to be wholly disconnected with the bill was introduced to prove the defence, and was asked by the defendant's counsel *if the bill had ever been in his possession before?* He replied, *he thought the question would have a tendency to convict him of usury*, and he was excused from answering upon the ground that the questions went to connect the witness with the bill, *and they might form links in a chain of evidence to convict him*. When a question is propounded, it belongs to the court to consider and decide, whether any direct answer to it *can* implicate the witness. If this be decided in the negative then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it *may* criminate himself, then he must be the sole judge what his answer would be. The

¹ Id. 268, 9, 271.

² 2 R. S. 405, § 71; (4th ed. p. 652;) 3 Hill, 895.

court cannot participate with him in this judgment, because they cannot decide on the effect of his answer, without knowing what it would be; and a disclosure of that fact to the court would strip him of the privilege which the law allows, and which he claims.¹

The exemption does not extend to a question, the answer to which may degrade the witness' moral character merely, and not subject him to any *legal penalty*. Questions of the latter description, therefore, he is bound to answer, provided they be relevant to the matter in issue, and not merely affecting his credit or competency.² Nor can the witness decline answering, merely because the answer may subject him to a civil suit.³

A witness can depose to such facts only as are within his own recollection; but to assist his memory he may use a written entry or memorandum, or the copy of a memorandum. And if the paper bring the fact to his recollection, such evidence will be sufficient. But if he cannot, from recollection, speak to the fact, except from finding it on the paper, his testimony goes for nothing. There is no need that the fact should be noted at the precise time it happened, for the witness must swear to his recollection, and it is not very material how it was brought to his mind. However, the entry must either have been made by the witness, or by another, and examined by him while he remembered the fact noted. Any paper whatever may be shown to him to enable him to correct a mistake. These remarks must be taken with the qualification that, if the paper be an original entry or memorandum, made by the witness, at or about the time, for the purpose of preserving the memory of the transaction, and the witness will testify that he believes it to be correct, though he has forgotten the transaction itself, the paper may then be read in evidence.⁴

When a witness has once been sworn, and given some evidence, the opposite party may cross-examine him. And if

¹ Per Marshall, C. J. in 1 Burr's Trial, 244; 1 Phil. Ev. 276; Cowen & Hill's Notes, 734 to 738, 747.

² 1 Coms. 83, 280.

³ Cowen & Hill's Notes to Phil. Ev. 739, 740, 741; 2 R. S. 405, § 71. [4th ed. p. 652.]

⁴ Sand. 512; 4 Id. 120; 2 Hill, 531.

a witness have once been examined by the party, the privilege of cross-examination continues in every stage of the cause; so that the other party may call the same witness to prove his case, and in examining him may ask leading questions. In the case, however, which proves the last position, the witness might possibly have shown a strong bias in favor of the party that called him, and on that account, perhaps, a greater scope was granted to the adverse party than is usually allowed. It may happen, on the other hand, that the party calls a witness unwillingly, and from mere necessity, knowing him to be favorable to the opposite side; in such a case, to allow the opposite party, on calling him up afterwards, as his own witness, to put leading questions would be giving him an unreasonable advantage. On the contrary, it might, perhaps, be proper to invest the party first calling him with some of the powers of cross-examination, and at the same time to oblige the other party to treat such witness as strictly his own, and confine him within the limits of an examination in chief. And, on a cross-examination, the party always makes the witness so far his own that he cannot examine as to any written evidence which comes out on such cross-examination in any other manner than as if the witness had been his own.¹ Ch. J. Tilgham, in 5 Binney, 488, makes the following excellent remarks on the subject of examination: "The party who calls the witness examines him first; he is then cross-examined by the opposite party, after which, if necessary, the party who produced him may examine him again. The mouth of the witness is not to be closed because the counsel omitted to ask a material question at first. It may be necessary, in order to come to the truth of the case, to examine him as to new matter, and after that there may be a second cross-examination. The court, in their discretion, may permit a witness to be examined over and over again at any time during the trial. But they will take care to exercise this discretion so as not to suffer any advantage to be gained by trick or artifice. If the plaintiff should declare that he had finished his testimony,

¹ 1 Phil. Ev. 273, 4; Cowen & Hill's Notes, 780; Selden, 845.

in consequence of which the defendant should dismiss some of his witnesses, and then the plaintiff should offer to produce new testimony, which might, perhaps, have been contradicted by the witnesses who were dismissed, the court would not suffer him to avail himself of such disingenuous conduct." And where the plaintiff's witness is in part examined, and the cause is then adjourned to another day, on account of the sickness of the witness, it is the duty of the plaintiff to produce him at the adjourned day, or show good cause for not doing so; otherwise, the Justice may reject the evidence; for, if admitted, the defendant would lose the right of cross-examination.¹

The right of cross-examination is highly prized by the law, and, as we have seen, courts of justice should be liberal and indulgent in its allowance. A very just latitude, in this respect, is suggested by Mr. Evans, in his annotations upon *Pothier*, vol. 2, p. 269: "In the case of *Hunter vs. Kehoe*, before the court of King's Bench in Ireland, Mic. 1794, Lord Clonmell observed that cross-examination had gone to an unreasonable length, but he had, in general, permitted gentlemen to go as far as they pleased, because if there was an honest case on one side it would do them no good." "The benefits of cross-examination," says the same author, "are sometimes defeated by the interposition of the court, to require an explanation of the motive and object of the question proposed, or to pronounce a judgment upon them immediately; whereas, experience frequently shows that it is only by an indirect and apparently irrelevant inquiry that a witness can be brought to divulge the truth which he had prepared himself to conceal; the explanation of the motives and tendency of the question furnishes the witness with a caution that may wholly defeat the object of it, which might have been successfully attained if the gradual progress from immateriality to materiality was withheld from his observation. The importance of an inquiry may sometimes be strongly felt by an advocate, and upon very reasonable grounds from his own instructions, with respect to the bear-

¹ 12 John. 299.

ing and circumstances of the cause, which the Judge, acting only upon the impressions of what has already been disclosed, cannot, by any possibility, anticipate. The full exposition of the motives can only be attained by a premature exposition of the case that is to be brought forward, and even when that can be done without prejudice to the party, the endeavor to satisfy the court would have the common effect of an interruption of the regular course of inquiry, and instead of assisting the accurate discussion of the question would, in all probability, terminate in confused and desultory altercation.

A party is not entitled to the benefit of the testimony of a witness who dies after he has been examined, and before the opposite party has had an opportunity to avail himself of a cross-examination.

Of Impeaching the Credit of a Witness.

For the purpose of impeaching the credit of a witness the opposite party may disprove the facts stated by him, or may examine other witnesses as to his general character, but they will not be allowed to speak to particular facts, or parts of his conduct; for, though every man is supposed capable of supporting the former, it is not likely that he should be prepared to answer the latter without notice. The regular mode is to inquire whether they have the means of knowing the witness' general character, and whether from such knowledge they would believe him on his oath. In answer to such evidence against character, the other party may cross-examine the witnesses, as to their means of knowledge, or may attack their general character, and by fresh evidence support the character of his own witness. The impeaching question may be general, as above stated, or it may be narrowed to the general character for truth and veracity.¹

In commenting upon the above rule, Mr. Evans makes the following remarks: "It is an established rule, that witnesses examined with a view to discredit the testimony of others, cannot be permitted to depose to particular facts of

¹ 19 Wend. 569, 579; 3 Hill, 178.

criminality, but can only express their general opinion, whether the party is or is not entitled to be believed on his oath; but the other side, to support the testimony, may inquire what are the reasons of disbelief, which sometimes, as in the case¹ above adverted to, are ridiculous enough. If it is declined to inquire into these reasons, there is considerable ground to presume a consciousness that the opinion is founded upon adequate motives. I have heard witnesses asked whether they had ever known the persons against whose veracity they depose, give false evidence in a Court of Justice: and upon their answering in the negative, it was intimated to the jury that the testimony to the discredit was absolutely frivolous; whereas, if the question had been, what were the reasons upon which the discredit was founded, a fraudulent conduct might have been shown, which indicated the want of moral and religious principle, and consequently affected the strongest ground of reliance upon testimony. When witnesses speak to the character of others, not only their own character, but their ability and opportunity to form an adequate judgment are circumstances very proper to be taken into consideration."

On this head of evidence, Ch. Justice Pennington says:² "It is bottomed on the plainest principle that can be imagined; that is, that one man is not entitled to the same credit with another. Witnesses, therefore, may be sworn to give the character of a witness examined in a cause: it is held, however, that only the general character of a witness shall be inquired into; and some hold that only the general character of the witness *in respect of his veracity when under oath*, is to be inquired of. I never could perceive any substantial reason for this opinion, nor is it adhered to in practice. Suppose a witness is a notorious cheat, sharper and swindler; although nothing has been particularly alleged against him on the ground of his veracity under oath, is he

¹ The case stated in Pothier, vo. 2, 250, is as follows: "A witness swore that a person examined on the other side was not fit to be believed upon his oath; and being asked his reason, said that he had never made a good fence since he came on his farm."

² Pennington on Small Causes, 158, 9.

to stand in point of credit, on equal ground with a man of unblemished character and good standing in society? Reason revolts at the idea. I take it that the general character of the witness, so far as it goes to show turpitude of mind, is in issue, less credit being due to a corrupt mind than a pure one : but you cannot examine as to particular facts which go to show this corruptness of mind." This doctrine was approved by the Supreme Court in 1842, where a witness called to impeach another, testified that he was acquainted with his general character, but he had never heard his character for truth and veracity spoken of. It was held that he might testify whether from his knowledge of the general character of the witness to be impeached he would believe him under oath.¹ But it is not enough to prove general bad character of a witness, unless it is followed up by the question whether the impeaching witness would believe him under oath.²

The credit of a witness may be impeached by showing that he has made statements out of court, either by parol, by letter, or by deposition, on the same subject, contrary to what he swears on the trial. But he must himself be first interrogated particularly concerning the alleged statement. Then, if effectually impeached, he may be again called to explain why he made it.³ His former consistent statements cannot, in general, be proved, in order to corroborate his testimony. If the alleged contradiction were in writing, as a letter, the witness cannot be interrogated concerning it unless it be produced, or its absence excused. And the same rule as to the degree of evidence applies of course to its positive introduction as impeaching evidence. The contradiction is considered as a general impeachment of credit ; and besides any proper explanations by the witness himself in reply, you may add evidence of his good moral character. And if an attesting witness to a deed impeach its validity on the ground of fraud, it may be supported by showing the good character of another subscribing witness, who is since dead ; though where two witnesses merely contradict each

¹ 2 Hill, 178.

³ 2 Seld. 345.

² 13 Barb. 623.

other as to facts, and no fraud is imputed, evidence of general character is not admissible in support of either.¹

A party will not be allowed to discredit his own witness, by showing his general character or any other facts directly impeaching him. But he may contradict him, and show the fact by other witnesses to differ from what he states it, and thus do away the effect of his testimony.² And where the party calls an attesting witness who denies his attestation, or a witness who has inveigled the party by making favorable statements to him, or to his attorney or counsel, in consequence of which he is called, but contradicts on oath what he stated before, he may be impeached by showing such former statement, or his general bad character, or other matter going to reduce his credibility, the same as if he had been called by the adverse party.³ But if a witness on cross-examination denies a particular fact which would go to impeach his general character, the cross-examining party cannot call witnesses to contradict him in respect to it.⁴

On the other hand, as a general rule, a party will not be permitted to give evidence of the good character of his witness, unless it has been attacked by witnesses on the other side. Where, however, the party against whom a witness is called, draws from him upon cross-examination extrinsic facts impeaching his general character, evidence of good character may be given in reply.⁵

Where an equal number of witnesses have been sworn on each side for the purpose of impeaching or sustaining a witness, it is in the discretion of the court whether to prevent an additional number of witnesses to be examined to the same point.⁶

Opinion of Witnesses.

In general, the opinion of a witness is not evidence; he speaks to facts. But in questions of science or trade, or

¹ 19 Wend. 569; 1 Phil. Ev. 293 to 308; Cowen & Hill's Notes, 771 to 779. ³ Cowen & Hill's Notes, 779, 782. ⁴ 15 Barb. 352; 2 Seld. 345. ⁵ 8 Hill, 309.

² 1 Phil. Ev. 308 to 311; Cowen & Hill's Notes, 779 to 782. ⁶ 24 Wend. 354.

which relate to any profession or calling, persons of skill may give their opinions in evidence.

Thus, physicians, surgeons, ship-builders, carpenters and engineers have been allowed to give their opinions on subjects connected with their professions or callings, and the value of property is every day determined in this manner.

But the opinions of witnesses, based upon a state of facts sworn to by others, are not proper evidence except in matters lying peculiarly within the knowledge of experts. Thus, in an action for negligently injuring and sinking a canal boat, the plaintiff, after proving the cause of action as alleged, called upon a witness, who testified that he was a boatman, and knew the boat in question previous to her being injured ; that he had raised sunken boats and caused them *to be repaired*. He was then asked the following question : From the description of the situation of the boat as given by the witnesses, what would the damage be ? The question was held improper and the witness' answer was inadmissible. The rule that a witness cannot in general speak to matters of opinion, does not apply where the *value* of the property is in question. And in an action for a breach of warranty, a witness may be asked what the article would have been worth if it had been of the quality which it was warranted to be. *The Court say in this case*, There was no error in allowing the witness to state what the cow would have been worth if good and young. The difference between the present value and what it would have been if as represented, is the true measure of damages. (2 Hill, 228 ; 4 id. 625.) The rule that a witness must state facts and not opinions, does not apply to cases like the present. How else than by the opinion of witnesses could the difference between an article delivered and the sample by which it was sold be determined. The value of personal property is constantly established by the opinion of witnesses, and so of facts in relation to many other matters. (Lincoln vs. Saratoga R. R. 23 Wend. 433 ; Norman vs. Wells, 17 Wend. 136 ; McKee vs. Nelson, 4 Cow. 355.) So also it was correct to allow the question put to the witness as to

what the animal would be worth if it gave but four quarts of milk per day.¹

The question was, what that cow which the witness had seen and knew, was worth, giving four quarts, and not what an imaginary animal giving that quantity would be worth. Judgment affirmed.²

Evidence of general character is also founded in opinion. And when a witness cannot recollect a precise conversation of which he is testifying, he may give his impression as to its substance.³

It is not competent for a medical witness who has not heard all the testimony tending to show the mental condition of a person, to give an opinion founded on the portion heard by him as to his sanity.

Upon principle it may be doubted whether strictly medical witnesses should ever give an opinion upon the general question of the sanity or insanity of a prisoner, as that is a question for the jury. It is in a sense testifying to the very point the jury must decide, the general merits of the cause, especially upon a preliminary inquest to try the part of insanity.⁴

Upon a question as to the mental capacity of the grantor in a deed, the opinion of a witness founded upon parts within his personal knowledge and disclosed by him on the trial, is competent evidence.⁵

Witnesses acquainted with the value of personal property are allowed to testify to their opinion of its value. The rule that witnesses must state facts and not opinions has no application to such cases.⁶

But the opinion of a witness in respect to the value of property which he has never seen, is not admissible in evidence.⁷

The opinion of a witness upon the question whether pay-

¹ *Paige vs. Hazard*, 5 Hill, 603, ⁴ *The People vs. Lake*, 2 Kernan, 358; 17 Wend. 161; 24 Wend. Cowen, J.

² *Joy vs. Hopkins*, 5 Denio, 84.

³ *Cowen & Hill*, 749, 759, 63.

668; 4 Denio, 311.

⁵ 13 Barb. 550; 7 Id. 314.

⁶ 22 Barb. 134; 5 Denio, 84.

⁷ 14 Barb. 206.

ments made to a minor were proper for a young man in his situation is not admissible.¹

Where an action to recover damages for wheat lost and wasted, by the defendant, while threshing the same for the plaintiff with a machine, in consequence of the work not being properly done, a witness had testified that he had examined the chaff and straw and found wheat among them, *it was held*, that he could not be asked how much wheat was wasted by the defendant, in threshing 648 bushels of wheat, on the ground that it was mere matter of opinion.²

The value of services may be proved by the opinion of witnesses who are acquainted with the value of labor in that vicinity but a defendant cannot prove by witnesses what the plaintiff's services were worth over and above his board, clothing, &c., furnished by the defendant without proving that the witness knew the quantity or value of either item assumed by the question to have been furnished.³

After a witness has testified that he is a brick and tile maker, and that he has made tile two seasons and brick nineteen years, he should be held qualified to answer the questions, "What is the proper way to put the tile in the kiln for burning?" and "What would be the effect of these tile lying flat-wise instead of on the end upon the burn?"⁴

A person engaged in the business of insurance, and in the habit of examining all kinds of hazards, and affixing the rates which they should pay for insurance, may be allowed to give his opinion upon the questions, whether a livery stable is more exposed to conflagration and a more hazardous risk than a tavern barn, and whether according to the usage and custom of insurance companies, it is worth more to insure a livery stable than a tavern barn.⁵

In an action to recover damages for killing a dog, the opinions of witnesses as to his value, are not admissible in evidence. *Brill vs. Flagler*, 23 Wend. 354, deciding the contrary, overruled, the jury being the judges of the value

¹ 2 Selden, 168.

² 21 Barb. 331.

³ 20 Barb. 387.

⁴ 19 Barb. 338, and case cited.

⁵ 17 Barb. 111.

of such property, after hearing the evidence as to the particular qualities and properties of the animal.

Proof of the worthlessness of the animal is proper in investigation of damages, although that defence was not set up in the answer.¹

Demand — When Necessary before bringing an Action.

Where any one comes lawfully into the possession of property, there is no conversion of it until some wrongful act is shown, or there is a refusal or neglect without excuse to deliver it to the owner upon demand. And until such conversion the owner may sell the property in the defendant's possession, and then the purchaser upon demand and refusal may bring an action for the recovery of the value of the property.²

It appears not only to be a well established, but a wise and just rule, that when personal property, the subject of the action, has come to the possession of the defendant, *by the delivery of the wrong-doer*, it is necessary when the defendant merely detains it, to prove that he has refused to deliver it up upon demand by the plaintiff, (see *Ely vs. Ehle*, 3 Coms. 508 ; *Barrett vs. Warren*, 3 Hill, 350,) and it matters not what was the nature or character of the fraud by which the property was originally obtained from the plaintiff, or in what character or in what manner it was delivered to the defendant if no fraud or complicity in the transaction can be imputed to him. And although the defendant is an assignee of an original wrong-doer, in trust for creditors, he is as well entitled to have an opportunity of considering and determining whether he should restore the property to the plaintiff as any other innocent transferee of the property.³

A sale procured by fraud on the part of the purchaser is not absolutely void. The party defrauded may or may not avoid the sale at his option.

But if he designs to rescind the contract he must do what-

¹ 17 Barb. 561, and cases cited.

³ *Fuller vs. Lewis*, 13 How. 219.

² 2 Comstock, 293; 5 Denio, 527.

ever may be necessary to restore the parties to the condition in which they were at the time of the sale, in respect to the thing sold and the consideration paid, and where the notes of the purchaser have been received in part payment of the purchase money, it is not sufficient to produce them at the trial, and offer to cancel them.¹

A demand of, and refusal to, deliver property, do not of themselves constitute a conversion, but only furnishes evidence of it, which may be repelled by proof, showing a good excuse for not complying with it. Thus, if the compliance with the demand was impossible, or impossible at the time, as when the demand was made at a different place from the one where the property was deposited, and the defendant replied that he was willing to deliver it at the proper place, or if he refused to deliver a stick of timber lying on his land, but at the time declared he had no claim to it, and did not intermeddle with it, or to deliver goods that he had found until it should be shown him that the person demanding them was the owner, or if a servant refused to deliver goods intrusted to him by his master, on a demand made by a stranger, the refusal was no evidence of conversion. In order to make refusal *prima facie* evidence, it should appear that the property was present at the time the demand was made, or under the undisputed control of the defendant, and that he refused to deliver it. And then the defendant may show the excuse for not complying with the demand. And where one who had come lawfully into possession of the property refused to deliver it, but afterwards, before the commencement of the action tendered it to the plaintiff, the action was defeated.

Where property was in possession of *partners*, a demand of it from one of them and the refusal, was sufficient to maintain an action against all the partners. But where it was in the hands of co-tenants not partners, a refusal by one to deliver it, was not evidence of conversion by both. And the refusal of a servant to deliver goods intrusted to him by his master because he has no authority from his mas-

1 13 Barb. 64; 1 Denio, 60; 2 Denio, 139; 1 Hill, 302; 2 Hill, 288.

ter, will not furnish evidence of conversion by his master, although it appear that his master subsequently approved his conduct.¹

Bona Fide Purchaser.

It is a well settled rule of law that if the owner of property stands by and allows another to sell it as his own to a *bona fide purchaser*, without objection and without giving notice of his claim thereto, he will be held to have consented to and sanctioned the sale, and will not afterwards be permitted to claim such property of the purchaser. This is a sound principle, founded upon the plainest dictates of fair dealing and common honesty. And the same rule prevails when the owner is informed of a sale of his property by another upon credit, and does not object to it, but lies by and permits the purchaser to pay the purchase money to the vendor as it becomes due.²

To constitute a person a *bona fide* purchaser, he must have *advanced the consideration for the purchase* in good faith.³

A purchase with intent not to pay for the goods, is fraudulent and renders the sale void as against the vendor, and he may reclaim them.⁴ But if he delivered them with intent to pass the property as well as the possession, a *bona fide* purchaser from the fraudulent vendee, that is, one who pays the price without notice of the fraud, acquires title as against the owner, although the latter might have reclaimed them from his vendee.⁵

It is not sufficient to constitute a *bona fide* purchaser in such cases, that he took the goods from the fraudulent vendee in payment or security for a previous debt. He must have given some value for it, or incurred some new responsibility upon the credit of the property without notice of the fraud ; and the owner can repudiate the sale and reclaim them from

¹ 5 Hill, 455; 24 Wend. 169, 178; 1 4 1 Hill, 302; 23 Wend. 611.

Cowen, 322; 4 Hill, 13.

² 18 Barb. 434; 16 Id. 613.

³ 10 Barb. 97, 107, and cases cited.

⁴ 8 Cowen, 238; 14 Wend. 31; 13 Id.

570; 20 Id. 267.

an officer who has levied upon them as the property of the fraudulent vendee.¹

As there are frequently questions arising in relation to the validity and priority of lien upon property by virtue of executions, a reference to the rules in relation to the subject will be useful under this title. At common law, executions issued from Courts of Record were regarded as issued only during terms of the Court. If issued in vacation they were deemed to have been issued on a day of the preceding term named in the *teste* of the writ, and title to the personal property which the defendant in the execution had at the day of *teste* was bound by it upon a levy made by the sheriff at any time before its return, and this notwithstanding they had been sold to purchasers ignorant of the execution and who paid full value.² The Revised Statutes have changed the rule by providing that "goods situated within the jurisdiction of the officer to whom an execution shall be delivered shall be bound only from the time of the delivery of the same to be executed;"³ and that "the title of the purchaser in good faith of any goods or chattels acquired prior to the actual levy of any execution without notice of such execution being issued, shall not be divested by the fact that such execution had been delivered to an officer to be executed before such purchase was made."⁴ It will be seen that this provision is intended for the protection of *bona fide* purchasers only, and is not in conflict with the one that goods shall be bound only from the delivery of the execution. One has reference to the rights of the party and all persons except *bona fide* purchasers, and the others to those of purchasers in good faith. From the moment an execution is delivered to a sheriff, the goods of the defendant are liable in his hands or the hands of all persons except purchasers in good faith, to be levied upon until its return day. But if one without notice of the execution should purchase them, paying value for them, the provision of the Revised Statutes would render the title of the purchaser valid and free from

13 Wend. 570; 23 Id. 611.

12 John. 406; 11 Wend. 550.

2 2 R. S. 365, § 13; [4th ed. p. 613.]

4 Id. § 17; 5 Denio, 619.

the lien. If, however, the purchaser should have notice of the execution, the goods would be bound and his title would be divested by a levy. And if he should purchase after a levy, whether with or without notice of it, his title would be subject to it and be divested by a sale by the sheriff.¹

Although a bill of exchange or promissory note of itself, imports a consideration which need not be pleaded or proved, and that the holder took it in the usual course of business, in good faith and for value, yet, as between immediate parties to it, as the drawer and acceptor, drawer and payee, maker and payee, payee and his endorsee, any total or partial want of consideration, or failure or illegality of consideration, may be shown as a defence.² And in like manner, when the defendant shows that the holder of the bill or note was not a purchaser of it in good faith, or for value paid at the time, or that he received it on account of a previous indebtedness, or purchased it after it had become payable, he may then interpose the defence. The policy of the law is, to protect the purchaser of commercial paper, who in good faith purchases it before its maturity, parting with value for it, from any defence existing between the original parties to it, except in cases where the statutes make notes given absolutely void, as in violation of the usury laws, or the acts in relation to betting and gaming.³ But he must appear with perfectly clean hands in order to avail himself of the character of a *bona fide* holder, and if it appear that he gave nothing, or but a trifle consideration for the paper, so as to make the purchase merely colorable, or that he bought it under suspicious circumstances which should have put him on his guard, it will be sufficient to let in any defence which existed between the immediate parties.⁴

Within the rules laid down in the preceding paragraph, one who is without any knowledge of the transaction out of which the bill or note originated, may, upon his estimate of the responsibility of the parties to it, purchase it before

¹ 11 Wend. 551.

³ 1 John. 319; 8 Wend. 600.

² 17 John. 301; 7 Cowen, 322; 2 44 Hill, 442, 424; Chitty on Bills, Wend. 431; 12 Id. 246; 13 Id. 605.

83, 4.

it is payable, and recover the amount for which it is given, notwithstanding it was given without consideration, or for an illegal consideration, as to compound a felony, or was for any other cause uncollectable by the original payee against the acceptor or maker, or although there was some vicious feature in the consideration passing between the endorser. While at the same time, the defence would be a perfect one between the original parties, and would also be available against the present holder, if the defendant should first show that he purchased the note with notice of the defence, or after it had become payable, or that he took it for a precedent debt, or paid no value at the time for it. The defendant, however, must rebut the legal presumptions in the plaintiff's favor before he can introduce the particular facts constituting his defence.¹

It is not enough, in order to admit the defence against a holder of a bill or note who has purchased it before its maturity, and paid full value for it, that he was informed that there had passed no consideration between the drawer and acceptor, or the maker and payee, unless he had notice also that the person from whom he received it, acted fraudulently in negotiating it. Nothing is more usual than to draw, or endorse, or accept a bill, or to make or endorse a note, merely for the *accommodation* of a friend, and as a loan of one's credit, and in such cases, the purchaser of the bill or note who pays value for it, is protected.² If, however, an accommodation paper was made or endorsed for a particular purpose, of which the purchaser has knowledge, and it be used for any other purpose, it will be invalid in his hands; and if when made for such purpose any circumstances have arisen which would render it unjust to the accommodation party to use it, no person aware of the fact, can by obtaining it, render it available against him.³

It will not be deemed a diversion of the purpose of the bill or note made to raise money for the accommodation of

¹ 5 Mass. 334; 3 Day, 311; 1 John. ³ Chitty on Bills, 91; 10 John. 231; 319; 8 Wend. 81. 15 Id. 270; 1 Den. 538.

² Chitty on Bills, 91; 7 John. 362; 7 Wend. 227.

the payee, or drawer, if it perform substantially the purpose intended. Thus if it be made for discount at one bank, and be there rejected, and discounted at another,¹ or if it be intended to raise money for E., and it was applied by him to pay up a judgment or other debt against him,² it will be valid in the hands of the person to whom it is negotiated, although he knew all the facts in relation to it.

In a few cases, where the statute has declared all contracts and securities given in violation of its provisions void, as in the acts restraining usury,³ betting and gaming,⁴ lotteries,⁵ and the like, bills and notes are void in the hands of *bona fide* purchasers and under all circumstances. Under the usury laws, a bill or note issued for the purpose of raising money and transferred at a discount greater than at the legal rate of interest, is usurious and void. But if it were valid in its inception, so that it might be collected by the payee against the acceptor and maker, it may be sold by the holder at any discount agreed upon between him and the purchaser, and will be valid in the hands of the latter against the other parties to it. And where A. and B., for the purpose of raising money, exchanged their promissory notes, and then A. sold the note he received of B. at a discount greater than at the legal rate of interest, it was held that the transaction was not usurious. For the note of A. was a good consideration to B. for the note he gave for it, and the latter was therefore a valid note in the hands of A., which he might dispose of in the same manner as if he had given a different consideration for it.⁶

Recoupement and Counter-Claim.

The doctrine of recoupement was established in the case of *Reab vs. M'Alister*, (8 Wend. 109,) which contains much useful information applicable to this branch of the law, now

¹ 4 Cowen, 567.

² 5 Wend. 66; 1 Hill, 518, 589; 2 Sand. 115; 5 Den. 329; S. C. 3 Coms. 442.

³ Laws 1837, ch. 480; [4th ed. R. S. v. 2, p. 182, § 5.]

⁴ 1 R. S. 662, §§ 8, 16; [4th ed. vol. 2, p. 72;] 1 R. S. 665, § 24; [4th ed. vol. 2, p. 76, § 31.]

⁵ 15 John. 44; 7 Wend. 256.

⁶ 3 Wend. 62.

under consideration. It establishes the rule that a defendant may not only give evidence of *fraud*, but of a breach of *warranty* in diminution of the plaintiff's claim in an action for the price of an article sold. It was there *held*, that such a defence is admitted to avoid *circuity of action*, that a second litigation on the same matter should not be tolerated where a fair opportunity can be afforded, by the first, to do final and complete justice to the parties.

The Legislature has so amended the Code of Procedure, as to extend this doctrine to damages arising out of other and different contracts than the one upon which the plaintiff claims. The sections read as follows :

§ 149. The answer of the defendant must contain :

1. A general or a specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief :

2. A statement of any new matter constituting a defence or counterclaim, in ordinary and concise language without repetition.

§ 150. The counterclaim mentioned in the last section must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action :

1. A cause of action arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action :

2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action.

The defendant may set forth by answer as many defences and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished.

It appears by the above sections that the defendant may, upon a proper notice, give evidence of damages arising upon

the breach of any contract existing between the parties in diminution of the plaintiff's claim, and if the amount exceed the plaintiff's demand, he may have judgment for the balance in his favor.

In *Vassear vs. Livingston*, (3 Kernan, 248,) the court say: "The counterclaim of the Code is undoubtedly broader and more comprehensive than set-off and recoupement. It authorizes a resort by the defendant to causes of action by way of defence, other than set-off or recoupement. It has attempted, however, to limit and define the defendant's rights. It clearly authorizes set-off and recoupement. It is clear they are authorized by the amendments of the Code of 1852, and something more. By the *second* subdivision of § 150, in an action arising on contract, the defendant may avail himself by way of *defence*, of any other cause of action, also on contract and existing at the commencement of the action.¹

Counterclaims under the Code of 1852, § 150, embrace both set-offs and recoupements as they were understood prior to that Code. (*Pattison vs. Richards*, 22 Barb. 143, 326.) A counterclaim, to be valid under the Code, must be a claim against the *plaintiff on the record*. The right to set up a counterclaim against the assignee after the assignment of a thing in action is not reserved or given in any part of the Code.²

Where a promissory note, dated January 24, 1853, was made by P., payable to R. or bearer, *with use*, no time of payment being specified, and the same was, within *three* days after its date, sold by R. to M., by whom it was transferred to the plaintiff. Held, that although the note was payable on demand, it could not be considered as overdue at the time of its transfer by R., so as to render claims against R., then owned and held by the maker, available as a set-off.³

In an action against several defendants who are *jointly and severally* liable, either of them may set off promissory

¹ 3 Kernan, 248.

² 22 Barb. 326.

³ *Weeks vs. Pryor*, 27 Barb. 79; 3 Hill, 582; 16 Wend. 659.

notes executed by the plaintiff, or may avail himself thereof by way of counterclaim. A counterclaim is defined to be one existing in favor of a *defendant* and against a plaintiff, between whom a several judgment may be had in the action and arising out of one of the specified causes of action; and the 2d subdivision provides that in an action upon contract, any other cause of action, arising also on contract and existing at the commencement of the action, shall be a counterclaim, (Code § 150.) The only restriction is, that it must be one existing in favor of a *defendant*, and against a plaintiff, between whom a several judgment *might be had* in the action.¹

The term counterclaim being new to the law, as well as the dictionary, judges have sometimes exercised themselves with the duty of framing a definition. The term itself has always seemed to me, simple and significant, and its meaning obvious.

I understand that when the defendant has against the plaintiff a cause of action upon which he might have maintained a suit, such cause of action is a *counterclaim*. The parties have *cross demands*. When such a cross demand is interposed by the defendant, there are, in effect, two causes of action before the Court for trial in the same suit. Both parties are, in some sense, plaintiffs, and both defendants. The answer containing the cross demand, called a counterclaim, is, in pleading, treated like a complaint by the defendant against the plaintiff, and the reply to such an answer like the answer to a complaint. Each party claims affirmative relief against the other.²

Under the Revised Statutes, a claim existing against the assignor in favor of the maker of a promissory note assigned before it became due, cannot be set off against the note in the hands of the assignee, and this although he had notice of the set-off *before* the transfer, such notice not being notice of any legal defence. Section 112 of the Code, which provides in case of an assignment of a thing in action, that the

¹ 20 Barb. 477; 8 Howard, 157, 454, ² Davidson vs. Remington, 12 Howard's Pr. 310, Harris J.

action by the assignee shall be without prejudice to any set-off or other defence existing at the time, or before notice of the assignment, does not apply; for, by the second clause of that section negotiable promissory notes and bills of exchange, transferred in good faith and upon good consideration before due, are expressly excepted.¹

I think it well settled that when the defendant has a cause of action against the plaintiff, upon which he might have maintained a suit, such a cause of action is a counterclaim. The parties then have cross demands, and affirmative relief may now be granted, and claims either legal or equitable, or both, are now pleadable in the nature of set-off, without regard to the form of the action. A counterclaim is also a set-off, as called under the previous practice. Counterclaims must, however, exist at the commencement of the action, which must be one arising from contract, and it may (under the first subdivision of § 150) exist in the cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.²

In the case of the assignment of a thing in action, the action of the assignee shall be without prejudice to any set-off or other defence existing at the time of, or before notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith and upon good consideration before due.³

In an action to recover compensation for services rendered, the employer is entitled to show, by way of recoupe-ment of damages, loss sustained by him through the *negligence* of the *employee*.⁴

Where an action is brought for breach of a contract, whether the same be sealed or not, and the defendant can show that the plaintiff has not performed the contract on his part, according to its terms or spirit, so as to entitle him to a cross action, he may, at his election, instead of bring-

¹ Williams v. Brown, 2 Keyes, 486. ³ § 112 of Code.

² Lemon vs. Trull, 13 How. 248, 458; ⁴ Still vs. Hall, 20 Wend. 57; Cow-
12 Id. 310; 9 Id. 263; 6 Id. 433; en, J.

⁴ Sandf. 147; 20 Barb. 477; 2 Duer,
639; 8 How. 122; Id. 146; Id. 234.

ing an action in his turn, *recoupe* his damages arising from the breach committed by the plaintiff, whether they be liquidated or not.¹

In an action brought upon promissory notes, the consideration of which was work and labor done by the plaintiff for the defendants, the defence was that while the plaintiff was in the employ of the defendants as their servant, they were possessed of drawings, plans, models, and patterns of steam engines, &c., which had names, numbers and marks inscribed on them, so as to identify them, and the plaintiff, contrary to his duty as such servant, *destroyed* the drawings and plans, and obliterated the names, numbers, and marks of the plans, models and patterns. *Held*, that the defendants might give evidence of such wrongful acts of the plaintiff for the purpose of reducing the amount of the recovery, it not appearing that the damages sustained by the defendants by means of such acts, were known to them, or were taken into the account, on liquidating the amount due to the plaintiff and giving the notes therefor.²

The damages to be allowed in such a case by way of recoupement, being only such as arise from breach of the plaintiff's contract, the deduction must be limited to such damages, and nothing can be allowed on account of the *malice* with which the wrongful acts were done.

Recoupement is in the nature of a cross action, and should not be pleaded in bar, but a notice given of the defence, and it is necessary to aver that the defendant claims his damages in the action.³

This doctrine is so well understood at the present time to extend to all actions arising on contract, as well as fraud growing out of the purchase and sale of property, that it is deemed inexpedient to pursue the subject further than to remark that this kind of defences ought to be encouraged whenever they can be interposed legally, and the party has a good defence of this kind, as it saves much unnecessary

¹ Ives vs. Van Eps, 23 Wend. 155; ² The Allaire Works vs. Guion, 10 Barb. 55; 3 Hill, 258; 13 John. 302; 1 Comstock, 305.

³ 2 Comstock, 288.

expense and litigation by cross actions to obtain precisely what may be adjusted and forever settled in one.

Infancy.

In relation to personal chattels the rule seems to be, that if an infant give or sell his goods and *deliver them with his own hand*, the act is *voidable* only ; but if he give or sell goods, the donee or vendee take them by force of the gift or sale, *the act is void*, and the infant may bring trespass. This distinction was recognized in *Roof vs. Stafford*, (7 Cowen, 179.) The infant brought *trover* for a horse which he had sold to the defendant, and the Court held that the sale was not absolutely void, on the ground that he had made *manuel delivery* of the goods, and being voidable only, that he could not avoid the sale until he came of age.¹

Nearly all of the contracts of an infant (except for necessities) are voidable at his election. And the better opinion seems to be that his executory contracts, and contracts of sale of personal property, may be avoided during his minority.²

Though that has been doubted, where he sells chattels and delivers them with his own hand.³ (See above case, 15 Wend. 631.)

The question in relation to the setting up of a new promise made by an infant after he comes of age is very fully discussed in the case of *Watkins vs. Stevens*, (4 Barb. 168.) In that case it was held that the contract of an infant, *unless for necessities*, could not become obligatory upon him, except by virtue of a new promise or ratification made by him after he became of age ; that such new promise or ratification must be equivalent to a new contract ; and that the suit against the infant could be sustained only on the contract created by the new promise or ratification, but that the rules of pleading admitted of the anomaly of allowing the plaintiff to declare on the original contract, which was not

¹ *Fonda vs. Van Horne*, 15 Wend. 631. ² 9 Cowen, 626; 17 Wend. 182, 419; 19 Id. 301.

³ 17 Barb. 428.

binding on the infant, and to reply specially the new promise made by him after he became of age, which was the only contract that could be enforced. It results from the fact of the original contract not being binding on the infant, that the new promise must possess all the ingredients of a complete agreement, to enable the plaintiff to recover against the infant.

Hence as no agreement is complete until the minds of the contracting parties meet the new promise, to be binding on the infant must be made to the creditor in person or to his agent. The new promise creates a new contract, and the old debt supplies the consideration. (See 4 Barb. 174, 175, 178; 11 Wend. 86; 2 Hill, 120.) Although most of the contracts of infants are now held to be voidable and not absolutely void, yet as they are not binding on the infant, a new promise does not impart to them any legal validity so as to enable the creditor to enforce them; but the new promise creates a new contract founded upon and deriving its aliment from the old demand, upon which the creditor may sustain a suit against the infant.¹

In *Goodsell vs. Myers*, (3 Wend. 479,) it was held that a negotiable promissory note made by an infant was voidable only, and not void, and might be affirmed after he came of age. In *Everson vs. Carpenter*, (17 Wend. 419,) the same doctrine was held, except that it did not appear in that case that the note was in its terms negotiable. *Delano vs. Blake*, (11 Wend. 85,) was decided upon the same principle, which was also recognized in *Bay vs. Gunn*, (1 Denio, 108.) There are some authorities which hold that a promissory note made by an infant is absolutely void, and not merely voidable, but I think the tendency of modern decisions is to consider the acts of infants generally as voidable merely, and to leave them when they come of age to affirm or disaffirm their contracts as their own views of interest may lead them to elect.²

¹ 22 Barb. 151; 2 Kent's Com. 234; ² 18 Barb. 321.

¹ Metc. 589; 17 Wend. 129; 11 Wend. 85.

When an infant makes a contract with a person of full age, the contract, although voidable as to the infant, is still binding upon the adult.¹

There is, however, one important exception to the general rule, viz: A fair contract for *necessaries* is binding upon an infant, *unless he lives with, and is supported by his father.*²

Infancy is a personal privilege, which no one but the infant can take advantage of.³

When, therefore, an infant is sued with a person of full age, the latter cannot take advantage of the infancy of the former.⁴

When in an action on a note against an infant, the defendant plead his infancy, and the plaintiff replied a new promise after the defendant came of age, *held*, that a promise to a stranger would not authorize a *recovery.*⁵

An action of ejectment may be maintained against an infant.⁶

The admissions of an infant are competent evidence against him, both in civil and criminal cases.⁷

An infant, who fraudulently obtains goods upon *credit*, with an intention not to pay for them, is liable in tort to the party injured.⁸

Where an infant enters into a contract for the purchase of property, and performs work in part payment of the price, but avoids the contract on arriving at full age, without having recovered anything under it, he may recover for the work on a *quantum meruit*, that is, what his services were reasonably worth.⁹

In an action by an infant to recover for work and labor, it is neither a defence nor a ground for reducing the amount of the recovery, that the work was done under a contract by the infant, to labor for the defendant for a fixed period of time, which he violated by leaving the defendant's employ with cause before the time had expired.¹⁰

¹ 7 Cowen, 28.

² 9 John. 141; 2 Cow. Tr. 704.

³ 2 John. 279; 5 John. 160.

⁴ 2 Cowen, 181.

⁵ 7 Hill, 120.

⁶ 3 Hill, 147, Cowen, J.

⁷ Id. 149

⁸ Wallace vs. Morse, 5 Hill, 391, Cowen, J.

⁹ Medbury vs. Watrons, 7 Hill, 110, Beardsley, J.

¹⁰ Whitmarsh and others vs. Hall, 3 Denio, 375, Jewett, J.

An infant feme covert cannot bind herself by deed so as to bar her right of dower. A contract of an infant, *not for necessities*, cannot become obligatory, except by new promise or ratification after he becomes of age, and this new promise or ratification must be replied specially to a plea of infancy.¹

There is no legal obligation on a parent to maintain his child independent of the statutes. Hence a third person who supplies an infant with necessities cannot maintain an action against the parent therefor, unless the latter has expressly or impliedly *contracted* to pay the amount.²

And no promise by the parent can be *implied* where the infant left his parent's house in disobedience of her express commands and went to live with the plaintiff under a contract that he should remain with the plaintiff until he should be twenty-one years of age.

A step-father is not entitled by law to the custody or services of the children of his wife by a former husband, nor is he bound to maintain them.³

The contracts of an infant are voidable only, and not void. They are subsisting liabilities, requiring, however, ratification after the infant becomes twenty-one, in order to be enforced.⁴

If an infant insist on a right of action he must show a compliance with the conditions on which his right of action is to arise irrespective of his age.⁵

A justice of the peace has no jurisdiction to proceed in an action against an infant defendant after service and return of the process until a guardian has been appointed. Until this has been done he has no right to receive the complaint of the plaintiff or the answer of the infant defendant.⁶

Tender.

It is provided by statute as follows :

“ When an action at law is commenced for the recovery

¹ 1 Barb. 399; 4 Barb. 168. NOTE.— No replication necessary by the new Code; see § 168.

² Raymond vs. Lloyd, 10 Barb. 488, and cases cited, Hand, J.

³ 3 Comstock, 312.

⁴ 54 Barb. 550; 86 How. 289.

⁵ 1 Keyes, 570.

⁶ Harvey vs. Large, 51 Barb. 222

of a sum certain, or which may be reduced to a certainty by calculation, or for a casual and involuntary trespass, or injury, the defendant may, before trial, or before the assessment of damages, or before judgment in an action of debt, tender to the plaintiff or his attorney, what he shall deem sufficient to pay the debt or damages, and costs incurred to that time.¹

“ If it shall appear upon the trial of the cause, or upon the assessment of damages, that the amount so tendered was sufficient to pay the plaintiff’s demand, and the costs of the suit or proceeding up to the time of such tender, the plaintiff shall not be entitled to recover or collect any interest on such demand, from the time of such tender, or any costs incurred subsequent to that time, but shall be liable to the defendant for any costs incurred by him subsequent to such time.²

“ If the action be to recover damages, and it shall appear that the sum tendered was a sufficient amends for the *injury* done, and for the costs as before mentioned, the plaintiff shall not be entitled to recover any costs in any such action or proceeding, incurred after such tender, but shall be liable to the defendant for his costs incurred *after that time*.³

“ If any such tender be *accepted* by the plaintiff, and he shall thereafter proceed in the action, the sum so accepted shall be deducted from the whole amount of the recovery, and judgment shall be only rendered for the residue; and an entry of such tender and acceptance shall be made on the record. The plaintiff’s right to recover costs, and his liability to pay costs to the defendant, shall be determined by the amount of such residue.”⁴

It appears by the foregoing provisions of the statute that the plaintiff is at liberty to accept or decline the *sum tendered*; but if he goes on with his suit, and does not recover a greater *amount* than the *sum tendered* he must pay the costs to the defendant.⁵

When money is brought into court the plaintiff is entitled

¹ 2 R. S. 457, § 20.

² 2 R. S. 457, § 21.

³ Id. § 22.

⁴ Id. § 23.

⁵ 12 Wend. 395, Nelson, J.

to it at all events, for the defendant admits the cause of action to the amount tendered, and in the manner charged in the declaration.¹

Where the tender is made in the case of a casual or involuntary trespass, the *court or jury*, as the case may be, must find whether the sum tendered is sufficient, and such finding will regulate the costs subsequent to such tender; or, whether such trespass was casual or voluntary, for if it was not the tender will be of no avail.²

A tender of *bank bills*, for a money payment, is in any case good, if not objected to on that account.³

A tender of money to an attorney, with whom the debt is left for collection, is good.⁴

So a tender to a clerk, agent, or servant, authorized to receive money for the principal, is good.⁵

In the case of cumbrous articles you are not bound to carry them with you, to seek the person who is to receive them; but first seek him, and inquire where he will have them delivered, and deliver them accordingly.⁶

If a merchant give a due bill for goods, and no time or place of payment is designated, the store of the merchant is the place of payment; and no action can be maintained on the due bill, until it is presented at the store, and the merchant shall refuse to deliver such goods as the owner of the due bill may select.⁷

If a *cabinet maker* give a due bill, payable in cabinet work, and no time or place of payment is mentioned, the shop of the cabinet maker is the place to make the demand; and the payee may select any article *not engaged*, or require of the maker to furnish an article such as he usually manufactures, in a *reasonable* time.⁸

So of a blacksmith or any other manufacturer, who should give a due bill payable in his work.⁹

¹ 1 Saund. 88; 2 Archbold Pr. 203.

² 13 Wend. 395, Nelson, J.

³ 7 John. 436; 12 Barb. 137.

⁴ 18 John. 110.

⁵ 20 Wend. 436, and cases cited; 20 Wend. 435, Chancellor.

⁶ 4 Cowen, 452; 8 John. 477.

⁷ 2 Cow. Tr. 803.

⁸ 2 Cow. Tr. 804.

⁹ Chitty on Con. p. 28, 29, 30; 5 Cow 516.

For further remarks on this subject, the reader is referred to 2 Kent's Com. 3d ed. 504 to 509 ; 20 Wend. R. 197, and cases cited.

There is frequently some difficulty in determining when an actual demand is necessary before *tender*. On a due bill to pay money on demand, no demand is necessary, but the bringing the suit is sufficient demand in law ; but it is otherwise on a promise to pay goods, &c., on demand.¹

Whenever a tender is made and is insisted on, in the pleadings the creditor is at least entitled to the amount tendered.²

Where the debtor admits a certain amount to be due by making a tender thereof, it is not a point of issue between the parties so far as he is concerned, and the creditor is not required to establish the amount by proof.³

A tender of the amount due on a judgment, if the same is not accepted, does not operate as the extinguishment of the lien of the judgment. Although as a general rule, money payable at no particular place must be tendered personally to the person to whom it is payable, yet where, on the day previous to the time when a payment upon a contract became due, the debtor made an ineffectual attempt to find the creditor, but his house was closed and nobody at home. *Held*, that a tender made at the *house* of the creditor on the day, to his family, he being absent from home and out of the county, was valid, the creditor being chargeable with notice that the money would be tendered at the day, and it appearing from the circumstances, that the creditor, by his voluntary absence, &c., intended to render it impossible for the debtor to make a valid payment on the day it became due.⁴

The cases in which a legal tender is indispensable notwithstanding a refusal to receive the money, and a general refusal to perform the contract on other grounds, are very few. The general rule is that a strictly legal tender may be waived, by an absolute refusal to receive the money on the principle

1 2 Cow. Tr. 807; 17 John. 248; 3

Wend. 13, 20.

2 Wood vs. Perry, 1 Barb. 114.

3 Id.

4 The People vs. Beebe, 1 Barb. 379;

Judd vs. Ensign, 6 Barb. 258.

that no man is bound to perform a nugatory act. Where there is a mutual obligation on a purchaser to pay or secure the purchase price, and on the vendor to convey the property purchased, an offer and readiness to perform on the part of the purchaser is enough, especially where the vendor refuses to convey at all.¹

A tender by an endorser of the amount due upon a promissory note, before suit brought, is not rendered invalid by being connected with a condition that the note shall be delivered to him. And a tender of the amount due upon the note before suit brought, is not rendered invalid by being connected with such a condition. As a general rule a tender must be unconditional. *But negotiable* paper is an exception. A defendant does not by bringing money into court, waive a tender made before suit brought, which he has pleaded. In case of a tender before suit, the defendant must plead tender and refusal, and bring the money into court, and plaintiff is entitled to it at all events.²

A tender of performance may be accompanied with such conditions as were, by the terms of the contract between the parties, conditions precedent to be performed by the party to whom the tender is made.³

Where a payment was to be made by the delivery of wagons, and the wagons were ready for delivery at the time and place stipulated, and were not actually delivered, because the party was not then ready to receive them, and were kept by his request until he was ready, &c. *Held*, that a further tender of the wagons was unnecessary, and that from and after the time when the wagons were ready to be delivered according to the terms of the contract, no further interest could be charged on the debt to be thus paid. (*Id.*) In order to constitute a valid tender, it must be proved that there was a production of the money and an actual offer of it to the creditor, *unless* it be shown that the latter dispensed with it by some positive act or declaration; it is not enough that the debtor had the money in his pocket, and informed the

¹ *Bellinger vs. Kitts*, 6 Barb. 273.

³ *Wheelock vs. Tanner*, 39 N. Y. 481.

² 8 Barb. 408; 7 Hill, 30; 12 Barb.

creditor that he was ready to pay, without offering to do so, nor that he retained it in an envelope, which was shown to or shaken at the creditor. There must be an actual offer or presentation of the money, so that the creditor can take it. To render a tender valid, the money tendered should be brought into court.¹

A tender of United States Treasury notes in payment of a debt is sufficient. A tender should be made irrespective of any other act. If a receipt or satisfaction piece is asked for it vitiates the tender.²

A plea of tender is an unequivocal admission of the justice of the plaintiff's claim to the extent of the sum tendered.³

A vendor who wishes to rescind the contract of sale or to hold the purchaser to a performance, on the day appointed should have his deed *prepared and executed* ready to be delivered on the payment of the purchase money. When the time for the payment of the purchase money is not an essential ingredient in, or inducement to, the execution of a contract of sale and purchase, the payment or tender may be made within a reasonable time after the day named.⁴

CHAPTER III.

The time for commencing actions other than for the recovery of real property.

SECTION 89. Periods of limitation prescribed.

90. Within twenty years.

91. Within six years.

92. Within three years.

93. Within two years.

94. Within one year.

95. When cause of action accrued, in an action upon a current account.

96. Actions for penalties, etc., by any person who will sue; when to be brought.

97. Actions for relief, not before provided for.

98. Actions by the people subject to the same limitation.

¹ Strong vs. Blake, 46 Barb. 227; 15 Wend. 637. ³ 20 Wend. 47; 23 Id. 340; 45 Barb. 554.

² 45 Barb. 554; 2 Denio, 196; 2 Hill, 538; 45 Barb. 579. ⁴ McWilliams vs. Long, et al. 32 Barb. 194.

§ 89. [69.] (Am'd, 1849.) *Periods of limitation prescribed.*

The periods prescribed in section 74 for the commencement of actions other than for the recovery of real property shall be as follows :

§ 90. [70.] (Am'd, 1849.) *Within twenty years.*

Within twenty years :

1. An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States.

2. An action upon a sealed instrument.

§ 91. [71.] *Within six years.*

Within six years :

1. An action upon a contract, obligation or liability, express or implied ; excepting those mentioned in section 90.

2. An action upon a liability created by statute, other than a penalty or forfeiture.

3. An action for trespass upon real property.

4. An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property.

5. An action for criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated.

6. An action for relief, on the ground of fraud, in cases which heretofore were solely cognizable by the court of chancery ; the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

§ 92. [72.] (Am'd, 1849.) *Within three years.*

Within three years :

1. An action against a sheriff, coroner or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty ; including the non-payment of money collected upon an execution. But this section shall not apply to an action for an escape.

2. An action upon a statute, for a penalty or forfeiture,

where the action is given to the party aggrieved, or to such party and the people of this state, except where the statute imposing it prescribes a different limitation.

§ 93. [73.] *Within two years.*

Within two years :

1. An action for libel, slander, assault, battery, or false imprisonment.

2. An action upon a statute, for a forfeiture or penalty to the people of this state.

§ 94. [74.] *Within one year.*

Within one year :

1. An action against a sheriff or other officer, for the escape of a prisoner arrested or imprisoned on civil process.

§ 95. [75] (Am'd, 1849.) *When cause of action accrues in an action on a current account.*

In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side.

§ 96. [76.] *Actions for penalties, etc., by any person who will sue ; when to be brought.*

An action upon a statute for a penalty or forfeiture, given in whole or in part to any person who will prosecute for the same, must be commenced within one year after the commission of the offence ; and if the action be not commenced within the year by a private party, it may be commenced within two years thereafter, in behalf of the people of this State, by the Attorney General, or the District Attorney of the county where the offence was committed.

§ 97. [77.] *Actions for relief, not before provided for.*

An action for relief, not hereinbefore provided for, must be commenced within ten years after the cause of action shall have accrued.

§ 98. [78.] (Am'd, 1849.) *Actions by the people subject to the same limitation.*

The limitations prescribed in this chapter shall apply to actions brought in the name of the people of this State, or

for their benefit, in the same manner as to actions by private parties.

CHAPTER IV.

General Provisions as to the Time of Commencing Actions.

SECTION 99. When action deemed to have been commenced.

100. Exception, when defendant is out of the State.

101. Exception, as to persons under disabilities.

102. Provision, where person entitled dies before the limitation expires.

103. In suits by aliens, time of war to be deducted.

104. Provision, where judgment has been reversed.

105. Time of stay of action by injunction or statutory prohibition to be deducted.

106. Disability must exist when right of action accrued.

107. Where two or more disabilities, limitation does not attach till all removed.

108. This title not applicable to bills, etc., of corporations or to bank notes.

109. Nor to actions against directors or stockholders of moneyed corporations or banking associations ; limitations in such cases prescribed.

110. Acknowledgment of new promise must be in writing.

§ 99. [79.] (Am'd, 1849, 1851, 1867.) *When action deemed to have been commenced.*

An action is commenced as to each defendant when the summons is served on him, or on a co-defendant, who is a joint contractor, or otherwise united in interest with him.

An attempt to commence an action is deemed equivalent to the commencement thereof within the meaning of this title, when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants or one of them usually or last resided ; or, if a corporation be defendant, to the sheriff or other officer of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business.

§ 100. [80.] (Am'd, 1849, 1851, 1867.) *Exception, when the defendant is out of the State.*

If, when the cause of action shall accrue against any person, he shall be out of the State, such action may be commenced

within the terms herein respectively limited, after the return of such person into this State ; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this State, or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

§ 101. [81.] (Am'd, 1849, 1851, 1852, 1870.) *Exceptions, as to persons under disabilities.*

If a person entitled to bring an action mentioned in the last chapter, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be at the time the cause of the action accrued, either :

1. Within the age of twenty-one years ; or,
2. Insane ; or,

3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than his natural life. The time of such disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought, cannot be extended more than five years by any such disability, except infancy, nor can it be so extended in any case longer than one year after the disability ceases.

§ 102. [82.] Am'd, 1849.) *Provision where person entitled dies before the limitation expires.*

If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives, after the expiration of that time, and within one year from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his executors or administrator, after the expiration of that time, and within one year after the issuing of letters testamentary, or of administration.

§ 103. [83.] *In suits by aliens, time of war to be deducted.*

When a person shall be an alien subject or citizen of a

country at war with the United States, the time of the continuance of the war shall not be part of the period limited for the commencement of the action.

§ 104. [84.] *Provision, where judgment has been reversed.*

If an action shall be commenced within the time prescribed therefor, and a judgment therein be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his heirs or representatives, may commence a new action within one year after the reversal.

§ 105. [85.] (Am'd, 1849.) *Time of stay of action by injunction or statutory prohibition to be deducted.*

When the commencement of an action shall be stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition shall not be part of the time limited for the commencement of the action.

§ 106. [86.] *Disability must exist when right of action accrued.*

No person shall avail himself of a disability, unless it existed when his right of action accrued.

§ 107. [87.] (Am'd, 1849.) *Where two or more disabilities, limitation does not attach till all removed.*

When two or more disabilities shall co-exist at the time the right of action accrues, the limitation shall not attach until they all be removed.

§ 108. [88.] *This title not applicable to bills, etc., of corporations, or to bank notes.*

This title shall not affect actions to enforce the payment of bills, notes or other evidences of debt issued by moneyed corporations, or issued or put in circulation as money.

§ 109. [89.] (Am'd, 1849.) *Nor to actions against directors or stockholders of moneyed corporations or banking associations ; limitations in such cases prescribed.*

This title shall not affect actions against directors or stockholders, of moneyed corporations or banking associations, to recover a penalty or forfeiture imposed, or to enforce a liability created by law ; but such actions must be brought within six years after the discovery, by the aggrieved party.

of the facts upon which the penalty or forfeiture attached, or the liability was created.

§ 110. [90.] (Am'd, 1849.) *Acknowledgment or new promise must be in writing.*

No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest.

The statute begins to run against a note payable on demand, from the date thereof; but is otherwise as to one payable *one day* after demand, for in the latter case it commences running only from the time of demand.¹

An action against an attorney must be brought within six years after the money is received by him, and the fact that demand was not made within six years before suit brought, will not save the statute.²

The statute limiting the actions against sheriffs and coroners to three years, *does not* extend to acts done *by color* of their office.³

In an action brought to recover a balance due upon a mutual current and open account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side. This class of accounts are such as exist where each party makes charges against the other in his books, for property sold, services rendered, or money advanced. A payment by one party upon an account against him, and for which he has received a receipt, does not render the account a mutual one.⁴ Items in an account furnished within six years, will not draw after them items before that time, so as to save the account from the statute, unless it appear that there were dealings by both the parties.⁵ But if there be mutual accounts, any one item on

¹ 13 Wend. 267, Nelson, J.

⁴ 15 Wend. 554.

² 15 Wend. 302.

⁵ 1 Sandf. 220; 2 Id. 318.

³ 19 Wend. 283.

either side having accrued within six years before the action, will draw after it both accounts and take the case out of the statute,¹ unless there appears a period of six years between any two of the consecutive items. If there is such a lapse between two consecutive charges, the account ceases to be an open one, as respects the prior items.²

The one hundredth section of the Code of Procedure above given, is similar in its language to a provision of the Revised Statutes. That has been interpreted by the courts to provide : 1. That where at the time an action accrues, the defendant shall reside out of the state, and he at any time thereafter comes into it in an open and public manner so that the plaintiff with ordinary diligence might have served him with process, the term of the limitation commences, and will continue to run, although the defendant return to his residence without the state, and that the clause declaring that "the time of his absence shall not be deemed or taken as any part of the time limited," related only to cases of departure from the state after the cause of action has accrued.³ 2. That where an action accrues against a resident, if he depart from and reside out of the state, the running of the limitation is suspended, and does not recommence running until he returns to reside within the state, notwithstanding he continues during his foreign residence to have a regular place of business within the state, to which he frequently resorted, and that his visits to the state during his residence without it are not to be computed as part of the statutory term.⁴ It has, however, been held by the Superior Court of the city of New York, and the late Court of Chancery, that all the absences of the defendant from the state after the cause of action accrued, whether he was or was not at the time a resident of it, are to be deducted from the statutory time.⁵

The departure and absence of one of several joint debtors does not stop the running of the statute. To have that effect all the joint debtors must go without the state.⁶

¹ 20 Wend. 72.

² 9 Id. 126.

³ 4 Denio, 577.

⁴ 5 Id. 582.

⁵ 2 Sand. 518; 2 Barb. Ch. 477.

⁶ 1 Denio, 445.

Neither does a judgment against joint debtors stop the running of the statute against one not served with process, nor prevent him from taking advantage of the fact that the demand was barred before the first suit brought, or before the action against him upon the judgment.¹

After the dissolution of a partnership an acknowledgment and promise to pay, made by one of the partners, *will not* revive a debt against the firm, which is barred by the statute of limitations. The leading cases on this question reviewed, and those of *Patterson vs. Chote*, (7 Wend. 441,) and *Johnson vs. Beardsley*, (15 John. 3,) holding a contrary doctrine *overruled*.²

It seems that the statute of limitations above referred to, is intended only to embrace *penalties* and forfeitures, properly so called, and other causes of action penal in their nature, and where both the cause of action and the remedy are given by statute, but does not extend to cases where the action is partly given by the common law and partly by the statute.

One of the two makers of a joint and several promissory note cannot after the debt is barred by the statute of limitations, revive the debt against the other maker, by making a payment on the note, so as to enable the holder to sue the latter upon the note as survivor after the death of the former. Partial payments made upon a joint and several promissory note by one of the makers, before the statute of limitations has barred an action upon it, will not revive the debt against the other parties to the note.³

The statute of limitations is a bar to an action on a promissory note, brought by the *payee* against the maker, although the former, after the expiration of six years from the time the note became payable, paid the amount of it to his indorsee, and thus became repossessed of the note.⁴

A promise made since the Code of 1848 took effect, to pay a debt *which was barred* by the statute of limitations, before the Code went into operation, will not revive the cause of

¹ 4 Denio, 56.

² 2 Comstock, 523

³ 10 Barb. 32; Id. 566, and cases cited; Allen, J.

⁴ Woodruff vs. Moore, 8 Barb. 171.

action unless such promise be in writing subscribed by the party to be charged thereby.¹

The statute of limitations begins to run against an action of trover from the time of conversion.²

Where A. received property belonging to B., after B.'s death, and C. took out letters of administration, and brought his action against the executor of A., who pleaded the statute of limitation, *Held*, that the statute only commenced running from the granting of letters of administration, and not from the receipt of the property, and that it was sufficient if the action was brought within six years after the granting of letters of administration.³

The section of the Revised Statutes which provides that the term of eighteen months after the death of any testator or intestate, shall not be deemed any part of the time limited by law for the commencement of an action against his executors or administrators, (2 R. S., 448, 558,) is not repealed by § 102 of the Code of Procedure, by which it is declared that if any person entitled to bring an action shall die before the time limited for the commencement thereof, and the cause survives, it may be commenced by his representatives within *one year* after his death.⁴

One having a claim against a person deceased has eighteen months after the death of the latter, during which, the running of the statute *is suspended*, and if personal representatives are appointed, he has, *in addition*, one year from the time of their appointment. Hence, an action upon a promissory note brought against administrators more than a year after issuing letters of administration, but within six years after the note became due, if eighteen months are excluded in the computation of time, is not barred by the statute of limitations.

When a note is made payable on demand simply, it is to be deemed due at its date and may be prosecuted immediately, although an actual *demand* must be made in order to entitle the holder to draw interest upon the principal sum. But when the note is payable on demand *with interest*, or

¹ Wadsworth vs. Thomas, 7 Barb. 445. ³ 5 Barb. 393.

² 6 Barb. 436.

⁴ Scovill vs. Scovill, 45 Barb. 517.

with annual interest, the statute of limitations does not begin to run until payment is actually demanded.¹

A defendant in a personal action who is a resident abroad cannot avail himself of the statute of limitations of this state until he has returned to, and actually been a resident of this state, and subject to process of its courts for a period of six years.²

The statute of limitations may be interposed in a surrogate's court as well as any other, and in a case where courts of law have a concurrent jurisdiction with the surrogates court, the six years limitation will constitute a bar to the proceeding in a surrogates court.³

The statute of limitations begins to run against a premium note given to an insurance company under the act of 1849 from its date, and at the expiration of six years from that time will constitute a good defense.⁴

The rule as to partial payments remains the same as it was before the Code, viz: that in order to take a case out of the statute of limitations, they must be made under circumstances to warrant a finding, as a question of fact, that the debtor *intended* to recognize as subsisting the debt in question, and that he was willing to pay it.⁵

When joint debtors are sued, some of whom are not served with the process or complaint, and judgment is obtained against all pursuant to the statute, such judgment does not prevent the running of the statute of limitations, in respect to the defendants on whom process was not served.⁶

Therefore, in debt on a judgment against a defendant not served with process in a former suit, he may plead that it was recovered without the service of process on him, and that the cause of action did not accrue within six years next before the commencement of the suit on the judgment.

A debt which was barred by the statute of limitations when the Code took effect, (1848,) is not revived by any

¹ 23 N. Y. 28; 39 Barb. 634.

⁴ Colgate vs. Buckingham, 39 Barb.

² Power vs. Hathaway, 43 Barb. 214;
20 N. Y. 224.

177.

⁵ Puket vs. King, 34 Barb. 193

³ Smith vs. Remington, 42 Barb. 75,
and cases cited.

⁶ 4 Denio, 56.

verbal promise to pay it, made after that time. The provision of the Code is wholly prospective. It reaches every case of acknowledgment made after that time. This was the conclusion reached in the Supreme Court, in Wadsworth vs. Thomas, (7 Barb. 445,) and may now be regarded as settled.¹

Warranty or Fraud on the Sale of Property.

A warranty of goods must be upon the sale, and not after, for then it is without consideration, so when upon a treaty for a sale and warranty made all is broken off, such a warranty will not extend to a subsequent sale, though it would be otherwise if I warrant a horse before sale, and another buys him immediately, for such sale is upon the strength of the warranty.²

And if when I am first in a treaty with the purchaser, respecting the sale *I offer to warrant the article*, the warranty will be binding although the sale does not take place till some days afterwards. And a warranty that an article is sound and shall continue so for a year is binding.³

There can be no doubt of the principle that where a vendor of a chattel is guilty of a fraudulent concealment of material facts in relation to the sale, to the injury of the vendee, an action at law is maintainable to recover damages. (18 John. 403 ; 6 Cow. 346 ; 14 Barb. 66.) In this last case the Court say, the law presumes that the purchaser reposes confidence in the vendor, as to all such defects as are not within the reach of ordinary observation, and therefore it imposes upon the vendor the duty to disclose fully and fairly his knowledge of all defects. Merely saying the horse had balked *once* and that he had made him go, was calculated to mislead and probably did mislead him into the belief that this defect did not really exist, as there had only been this one slight evidence of it. The defendant told the truth as far as he went, *but he did not tell the whole truth*. This he should have done fully and fairly.⁴

¹ 2 Kernan, 635, and cases cited, by Gardiner, J.

³ 11 Wend. 584.

² 3 Bl. Com. 166; 1 Strange, 414.

⁴ 22 Barb. 652; 14 Barb. 66.

And where an article is warranted sound, and there is any fraud in the sale, on discovering the defect the buyer may, at his option, return it and sue for the consideration paid, in an action, or he may keep it, in which case his action is alone on the warranty or for the fraud as the case may be.¹

If there is *fraud in a sale* on the part of a vendor, the vendee may rescind and recover back the consideration paid in an action for money had and received; but in such a case the vendee must restore or offer to restore all he has received under the contract, and he cannot rescind in part and affirm as to the residue even where the sale is of several articles at distinct prices for each.²

No particular form of words is necessary to constitute a warranty, but an assertion or affirmation concerning the thing sold to be evidence of a warranty, should be positive and unequivocal, one which the buyer relies on, which is understood by the parties as an *absolute assertion*, and not the mere expression of an opinion.³

And an affirmation that a horse is not lame, accompanied by a declaration of the seller, *that he would not be afraid to warrant him*, is enough to establish a warranty.⁴

And the word warrant need not be used; any words of an import equivalent to warrant are sufficient, and whether what was said amounts to a representation of soundness, or a mere expression of opinion, belongs to a jury, or a Justice sitting in their stead, to determine.⁵

If a man should say on the sale of a horse, *I promise you the horse is sound*, it is difficult to conceive that this is not an express warranty; so if a seller say to the buyer of a horse *in the course* of dealing: "You may depend upon it the horse is perfectly quiet and free from vice," this representation amounts to a warranty. If a person at the time of selling a horse say, "I never warrant, but he is sound as far as I know," this is a qualified warranty, and the purchaser

¹ 3 Esp. R. 82; 23 Wend. 350.

⁴ 13 Wend. 277.

² 2 Hill R. 288; 21 Barb. 82.

⁵ 10 Wend. 411; 8 Cow. 290; 2

³ 4 Cow. 440; 19 J. R. 290; 20 J.R.

Cow. 138.

may maintain an action upon it, if he can show that the horse was *unsound* to the knowledge of the seller.¹

In a contract for the sale and delivery of an article of merchandise *at a future day*, when there is no selection or setting apart at the time, of particular articles of property, so as to pass the property *in presenti* to the purchaser, *merchantable quality*, such as will at least bring the average market price, is always intended.²

If I engage a mechanic to manufacture an article in his line of business, without any stipulation, the law implies an obligation to make it in a *skillful and workman-like manner*. So if I contract with a merchant to furnish me with a quantity of wheat at a future day for a certain price, without any other stipulation, the law implies that it shall be of a good and merchantable quality and condition; common honesty is exacted in all, in their dealings with one another, without any stipulation for it.³

The above cases, however, must be received with this qualification, that wherever there is wilful or known misrepresentation, concealment or fraud by the vendor, either as to the kind, the soundness, quality, goodness, or any other particular, of the article sold, an action for the deceit lies under all conceivable circumstances, though the contract be in writing, though it be sealed and contain covenants of warranty, or any other covenants calculated in the most extensive manner to guard and protect the plaintiff's rights, if the defendant have been dishonest in the transaction, the plaintiff may disregard all these, and sue him directly for the fraud.⁴

Fraud is a crime, and whenever a court or jury are convinced of its existence, to the injury of another, they may and should give damages, as in other actions, for a wrong involving moral guilt, with a liberal and unsparing hand, both to compensate the plaintiff for his extraordinary trouble in vindicating himself against the injury, and to furnish a

¹ 19 John. 290, Spencer, Ch. J.; 4 39 Wend. 20, 28; 18 Wend. 489, in error.
Car. & Payne, 45.

² 23 Wend. 350.

⁴ 1 Cow. Tr. 359; 4 Hall Law Term, 618.

moral lesson to their country for the punishment of the defendant.¹

In contracts for the sale of provisions, a warranty on the part of the seller is implied, that they are sound and wholesome, especially if the provisions be intended for domestic use.²

In a late case in the Supreme Court of this State, it was decided that if a horse be sold with a warranty of soundness, the vendee has no right to *return him* and recover back the price paid, although he turns out to have been unsound at the time of sale, unless there be either an *agreement* to that effect, or *fraud* on the part of the vendor.³

On an executed present sale of an article, with warranty as to quality, it is neither necessary nor allowable to rescind the sale, and return or offer to return the property sold on account of a breach of the warranty, and the buyer's omission to do so, in no way impairs his right of action for damages for such breach. It is otherwise where the sale is executory of goods to be of a particular quality.⁴

To sustain an action upon a warranty, it is not necessary that all the representations made by the defendant should be false or all actionable. If any part of the representations are actionable it will suffice.⁵

Where a partner upon selling promissory notes belonging to the firm and for their benefit, stated to the purchaser that he would warrant them to be good notes and they would be paid, that they were given for a valuable consideration, and were regular business paper, &c., which representations were false. *Held*, that the firm was bound by the representations made by the partner on selling the notes, and that an action would lie against all the members of the firm upon the warranty.

A positive affirmation of a fact is a sufficient warranty. An affirmation in regard to an existing fact, distinctly and

¹ 1 Cow. Tr. 359, and cases cited.

² 17 Wend. 268, Cowen, J.; 12 Johnson, 468; 18 Wend. 449.

³ 4 Hill, 625; 2 Hill, 288; 14 N. Y. 597.

⁴ Rust vs. Eckler, 41 N. Y. 488; 14 N. Y. 597; 25 N. Y. 306.

⁵ Sweet vs. Bradley, 24 Barb. 549; 10 Wend. 41; 6 Barb. 537.

positively made, in negotiation for trade, should be regarded as a contract and enforced as a warranty. The rule is well settled that no particular form of words is essential to constitute a warranty of quality, and any assertion of the vendor concerning the articles sold, if it be relied upon by the vendee and understood by the parties as an absolute operation, and not merely an expression of opinion, will amount to a warranty.¹

In case of an express or an implied warranty of the quality of the chattels, the *purchaser* may, without offering to return the property, sustain an action to recover for the breach of the warranty, or recoupe the damages in an action against him for the purchase price. Such action or recoupement is not barred by the omission of the purchaser to notify the vendor of the breach, and by his retaining and disposing of the articles warranted.²

The purchaser may recover for the breach, although he has sold the goods, and no claim has been made upon him, and he is liable to none on account of the alleged defect.³

Upon the breach of a warranty of a horse, if the horse be returned the measure of damages is the price paid for him; if the horse be not returned, the measure of damages is the difference between his real value and the price given. The *actual value* at the time of sale, and not the price paid is the criterion. That is to say, the measure of damages, is the difference between the *value* of the horse at the time of the sale, considering him as sound, and his *value* with all the *defects* complained of. The price paid is, however, strong evidence of what the horse would have been worth if sound, and should always control, unless it be clear that the actual value was either greater or less.⁴ (Cowen, J.)

In an action for the breach of a warranty of soundness on the sale of a horse, the proper measure of damages is the difference between the value of the horse at the time of sale,

¹ Wilbur vs. Cartright, 44 Barb. 536; ³ Id.

24 Barb. 549. and cases cited.

⁴ 4 Hill, 625; 2 Hill, 288; 14 N. Y.

² Muller vs. Eno and others, 14 N.Y. 597.

597; 25 N. Y. 806; 2 Hill, 288; 4 Hill, 625.

considering him sound, and the value with the defect complained of.¹

The law does not, in ordinary cases, impose upon a purchaser of property the duty to disclose to the seller, at or before the sale, the state of his pecuniary circumstances, however desperate they may be and be known by him to be. Although the knowledge may be of the highest importance to the seller, for the protection of his interests, the duty of communicating it is only a moral duty belonging to a large class of similar duties denominated by Chancellor Kent, "imperfect obligations which are binding in conscience, but which human laws do not and cannot undertake directly to enforce." (2 Kent's Com. 4th ed. 490.)

Parties to contracts must themselves exercise reasonable care to guard against loss, and in general that degree of care requires the party giving credit to make inquiries of the party to whom it is given, at least in regard to his ability to pay. For a fraudulent misrepresentation, by the purchaser, of important facts in respect to his circumstances, accompanied with damage, the law affords a remedy, the sale may be avoided, and an action for the fraud to recover the damages will lie. The general principle above stated, that the purchaser is under no obligation to disclose to the seller his insolvency although known to him, is, I think, equally applicable, notwithstanding there has been a long course of dealing between the parties, in the course of which credit has been given to the purchaser, and he has punctually performed his engagements, his insolvency having occurred during their dealings.

No relation of trust or confidence is thereby created, which should entitle the seller to expect of the purchaser, or require of the purchaser, as a legal duty, to communicate to the seller, information of his inability to pay all his debts, while he continues his business and the management of his affairs. If there is any such obligation to disclose in such a case, where does it commence? At insolvency, or on the way to insolvency, and at what point, and what proof of knowledge

¹ 10 Barb. Rep. 211.

is required? An attempt to extend the protection of the law to purchasers, so far as to impose such an obligation, would work much more injustice than it would remedy.¹

The rule in regard to the duty of disclosure on the part of persons dealing with each other, is substantially the same both in law and equity. It confines the obligation to disclose material facts, to a party who is under some special obligation, *by confidence reposed or otherwise*, to communicate them truly and fairly. In the case of the sale of property, the law presumes that the purchaser reposes confidence in the vendor *as to all such defects* as are not within the reach of ordinary observation; and, therefore, it imposes the duty upon the vendor to disclose fully and fairly his knowledge of all such defects. But in ordinary cases the vendor reposes no such confidence in the purchaser, hence it has been held that a purchaser may use any information he may have, in regard to property, for his own advantage, without disclosing it, *provided he does nothing to mislead or deceive*.

While a party in whom no trust or confidence is reposed, and between whom and the other party no legal relation in regard to the subject of the purchase exists, need not disclose material facts, within his knowledge, which he knows such other party to be ignorant of, *he must do nothing whatever to deceive or mislead*, or he will not be protected.

The plaintiff having lost a flock of sheep, made search and inquiry for them without effect. Subsequently the sheep were taken up in the highway by one D., who informed one of the defendants thereof. The other defendant then went to the plaintiff, and concealing from him his knowledge of the sheep having been found, inquired whether he had found them. Being informed that he had not, the defendant said *he supposed he never would find them*, and offered the plaintiff ten dollars for the sheep, which the plaintiff accepted, and gave him a bill of sale thereof.

The defendants then went to D. and claimed the sheep and their fleeces, and the same were delivered to them. In an action by the plaintiff to recover the value of the sheep and

¹ Mitchell vs. Worden, 20 Barb. 258, Strong, J.

wool, on the ground that the sale had been procured by fraud, *Held*, that the action could not be maintained on the ground of the defendants neglect to disclose the facts within their knowledge, but that the defendants *were made liable* by the expression of a belief that the plaintiff would never find his sheep, by means of which he was deceived and misled.¹

Negligence.

Negligence is a violation of the obligation which enjoins care and caution in what we do. But this duty is relative, and where it has no existence between particular parties there can be no such thing as negligence, in the legal sense of the term. A man is under no obligation to be cautious and circumspect towards a wrong-doer. A horse straying in a field falls into a pit left open and unguarded; the owner of the animal cannot complain, for as to all trespassers the owner of the field had a right to leave the pit open or as he pleased, and they cannot impute negligence to him. But injuries inflicted by design are not thus to be excused. A wrong-doer is not necessarily an outlaw, but may justly complain of wanton and malicious mischief. Negligence, however, even when gross, is but an omission of duty. It is not designed and intentional mischief, although it may be cogent evidence of such an act. (Story on Bail'm, §§ 19, 22; Gardner vs. Heartt, 3 Denio, 236.) Of the latter a trespasser may complain, although he cannot be allowed to do so in regard to the former.

One who complains of another's negligence should himself be without fault. (Brownell vs. Flagler, 5 Hill, 282; Cook vs. The Champlain Trans. Co., 1 Denio, 99.) Where the plaintiff at the time of the alleged injury was trespassing on the defendant, or otherwise wrong in the particular act complained of, such delinquency alone, with very limited exceptions, is a decisive answer to any claim for damages founded on the defendant's negligence.

It is a well settled rule of law that an action cannot be

sustained against a defendant for his wrongful and negligent acts, if the wrongful or negligent act of the plaintiff co-operated with the misconduct of the defendant, or his servants, to produce the damage sustained. Not that the co-operating act of the plaintiff must be wrong in intention, to call for the application of this principle, for such is not the law. The act may be one of mere negligence on his part, still, he cannot recover. Or his beast, while trespassing on the land of another person, and that without the consent or knowledge of its owner, may have been damnified through some careless act of the owner of the land, yet the fact of such trespass constitutes a decisive obstacle to any recovery of damages for such injury.¹

Let us now see what a man may do in the enjoyment of his own property without being answerable to others for consequential damages, *always assuming* that he acts with proper care and skill. He may set fire to his fallow ground, and though the fire run into and burn the woodland of his neighbor, no action will lie. (Clarke vs. Foot, 8 John. 421; Stuart vs. Hawley, 22 Barb. 619.) He may open and work a coal mine in his own land, though it injure the house which another has built at the extremity of his land. (Parridge vs. Scott, 3 Mees. & Welsh. 220.) And he may do the same thing, though it cut off an underground stream of water which before supplied his neighbor's well, and leave the well dry. (Actor vs. Blundell, 12 Id. 324.) He may build on his own land, though it stop the light of his neighbor; (Parker vs. Foot, 19 Wend. 309;) and even though he build for the purpose of stopping the lights. (Mahan vs. Brown, 13 Id. 261.) He may pull down his own house, though the adjoining one fall for the want of the support which it before had; and he may do it without shoring up the adjoining house, that being the business of the owner. (Peyton vs. Mayor and Commonalty of London, 9 B. & C. 725.) He may pull down his own wall, though the vaults of his neighbor be thereby destroyed. (Chadwick vs. Trower,

¹ 5 Denio, 255, and many cases cited by Beardslev. J.; 21 Wend. 615; 5 Barb. 387.

6 Bing. N. C. 1.) He may build a house and make cellars upon his soil, whereby a house in the adjoining soil falls down. (Com. Dig., action on the case for nuisance, C.) He may dig in his own land, though the house which his neighbor had previously erected at the extremity of his land be thereby undermined and fall into the pit. (2 Rolle's Ab. Trespass, 1 pl. 1; Wyatt vs. Harrison, 3 B. & Ad. 871.) In Pantou vs. Holland, (17 John. 92,) the defendant for the purpose of laying the foundation of a house on his own land, dug some distance below the foundation of the plaintiff's house in the contiguous lot, whereby the walls of the plaintiff's house were cracked and the house was otherwise injured, and it was held no action would lie.

In Lasala vs. Holbrook, (4 Paige, 169,) the plaintiffs were the owners of a church, built within six feet of the line of their lot, and the defendant, for the purpose of building in his adjoining lot, was sinking the foundation for his building sixteen feet below the natural surface of the ground, and ten feet below the foundation of the church, whereby the foundation of the church was greatly endangered; and yet an injunction to restrain the excavation, had been granted by a master, was dissolved by the Chancellor, on the ground that the defendant was exercising a lawful right.¹

If ordinary diligence by the plaintiff will not prevent the injury, he is not considered in any degree the author of the wrong. This seems to be the equitable rule, and it accords, too, with the principle that one is not to be indifferent and reckless because another has done him an injury, but *must exercise* reasonable diligence to prevent damage. (Sedgwick on Damages, 98.) Ordinary care, however, means that due and reasonable diligence is to be exercised according to the circumstances of each particular case, to prevent an injury.²

The degree of precaution, care and skill required of a carrier of passengers by stage coaches, in the preparation and management of the means of conveyance, is not a test of that which is required of those engaged in transporting

¹ 4 Comstock, 195, Bronson, J.

² 17 Barb. 95; 6 Hill, 592; 5 Hill, 282; 19 Wend. 399; 4 Comst. 349; 21 Wend. 615.

persons at a high rate of speed, by means of steam power, and it is immaterial whether a railroad company manufactures the cars and engines used in transporting passengers, or procures them from others, it is responsible that the utmost precaution, care and skill have been exercised in their construction to render them sufficient and safe.¹

Where a railroad company neglects to maintain fences and cattle guards along its road as required by the general railroad act, (Laws of 1850, p. 233, § 44,) and cattle get upon the track and are injured by its engines or cars, the corporation is liable to the owner in damages, although he is not an adjoining proprietor, and it does not appear how or where the cattle came upon the road.²

A railroad company which omits to comply with the statute as to erecting and maintaining fences and cattle guards, is liable to the owner of cattle which stray upon the track from an adjoining close or the highway crossing it, and are there injured by the engines of the company, although they were not lawfully in such close or highway. In such a case, the mere negligence of the owner in permitting his cattle to stray upon the land of another adjoining the railroad, or to run at large in the highway which crosses it is not a defence to the corporation.³

A city corporation is not liable for injuries to third persons occasioned by the negligence of workmen engaged in grading a street, under the direction of a person who has entered into a contract with the corporation to perform the work in conformity to a plan referred to in the contract for a specified sum to be paid by the corporation. A recovery for such injury can be had only against the person actually guilty of the wrongful act, or against one to whom he stands in relation of servant or agent. The contractor in such case is not the servant or agent of the corporation.⁴

A contractor who has undertaken to construct for a municipal corporation a sewer in a public street is not responsible

¹ 8 Kernan, 9.

³ 8 Kernan, 42; 2 Id. 245.

² Corwin vs. N. Y. & Erie Railroad Company, 3 Kernan, 42.

⁴ Pack vs. The Mayor, &c., of New York, 4 Seld., 222; -1 Kernan, 432.

to it for damages to which it has been subjected in consequence of his leaving the sewer during its construction exposed, by means whereof one passing along the street fell in and was injured, unless the contract provided that he should by lights, barriers, or other precautionary measures, protect the public against accidents ; and where the contract simply provides for the construction of a sewer, the duty of the contractor to his employer is limited to constructing it with reasonable skill. There is no implied agreement that he shall take measures to prevent persons falling into it while in process of construction.

It is the duty of a municipal corporation in the construction of its public works to cause precautionary measures to prevent accidents to passengers during their construction, and it may do this by express contract for the purpose, either with the contractor for the work, or with other persons.¹

Where persons having a license or grant to construct at their own expense a sewer in a public street, engage another person to construct it at a stipulated price for the whole work they are not liable to a third person for any injury resulting from the negligent manner in which the sewer may be left at night by the workmen employed in its construction. The immediate employer of the agent or servant, through whose negligence an injury occurs, is the person responsible for the negligence of such agent or servant.²

A defendant is liable in damages to the plaintiff for negligence in leaving post holes open and unprotected which he had dug for a fence along the line of, and contiguous to the street opposite his premises, whereby the plaintiff, in the night time, in passing along the street, stepped into one of the holes and was seriously injured.³

Chattel Mortgages.

The following is a proper form for a chattel mortgage :

¹ City of Buffalo vs. Holloway, 3 Selden, 498; ² Denio, 433, and cases cited; ³ 1 Hill, 545

² Blake vs. Ferris and others, 1 Selden, 48.

³ Wright vs. Saunders, 39 How. 136.

SCHEDULE.—[*Here name the property to be mortgaged.*]

Whereas, I, _____, am indebted to _____, in the sum of _____ dollars and _____ cents, for [*here state the cause of the indebtedness.*]

Now, for securing the payment of the said debt to the said _____ I do hereby sell, transfer and assign to the said _____ the property mentioned in the foregoing schedule :
 Provided, that if the said _____ shall pay to the said _____ the said sum of _____ dollars and _____ cents, with the interest, on or before the _____ day of _____ next, then this transfer to be void and of no effect. But in case of non-payment at the time above mentioned, the said _____ shall have full power to take possession of said property, to sell the same, and the avails to apply in payment of the above debt. And in case the said _____ shall at any time deem himself insecure, it shall be lawful for him to take possession of said property, and sell the same at public or private sale, previous to the time before mentioned, for the payment of the said debt, applying the proceeds as aforesaid, after deducting all expenses of the sale and of the keeping of said property.

Witness my hand, at _____ this _____ day of _____ 187 .

WITNESS PRESENT :*

What shall constitute fraud in the assignment of personal property, has been much agitated in the English courts as well as our own, and a detailed review of the cases on that subject would be neither profitable nor instructive. They all appear to have settled down in the doctrine, which has been since recognized and declared by statutory enactment, which declares that every sale made by a vendor of goods and chattels in his possession, or under his control, and every *assignment* of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such

* NOTE —A Seal is unnecessary.

assignment, or subsequent purchasers in good faith, and shall be conclusive evidence of fraud, unless it shall be made to appear on the part of the persons claiming under such sale or assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers.¹

I consider it well settled that chattels which have been mortgaged may, notwithstanding, be seized upon execution against the mortgagor, where he is in possession, and at the time of the seizure is entitled to the possession for a definite period against the mortgagee. This was assumed to be the law in *Mattison vs. Barnes*, in the Court of Appeals, (1 Comst. 295,) and the principle has been repeatedly recognized by the former and the present Supreme Court, and the late Court for the Correction of Errors, and has never, so far as I know, been denied by any court in this state.²

A chattel mortgage is something more than a mere security. It is a conditional sale of the thing mortgaged, and operates to transfer the legal title to the mortgagee, to be defeated only by a full performance of the condition. Nothing short of actual payment, in case of a breach of the condition before foreclosure or sale, or voluntary waiver or surrender, can re-vest the legal title in the mortgagor. After forfeiture in the terms of payment, the legal title becomes absolute in the mortgagee, and the mortgagor has no interest therein, except a mere equity of redemption, (12 Wend. 61; 2 Denio, 170; 1 Comst. 496; 3 Kernan, 556; 3 Denio, 33;) and a tender of the money for the whole debt, does not re-vest the title in the mortgagor.³

Nor does the omission to refile a copy of a chattel mortgage, as prescribed by the statute, (Laws of 1833, p. 402, § 3,) affect its validity as against subsequent mortgagees, who have notice of it.⁴

The question of fraud in a personal mortgage should

¹ 2 R. S. 70, § 5.

² 1 Kernan, 505, Denio, J.; 3 Wend.

498; 7 Id. 135; 8 Id. 339; 10 Id. 318; 17 Id. 53; 1 Barb. 542.

³ 20 Wend. 17; 1 Comst. 295; 3 Wend. 498.

⁴ Hill vs. Beebe, 3 Kernan, 556.

always be submitted to the jury, although no change of possession accompanies the mortgage, and the verdict of the jury in favor of the *bona fides* of the transaction, will be as conclusive as upon any other question of fact. A judgment confessed by the mortgagor to the mortgagee, for the same debt secured in the mortgage, does not merge or extinguish the mortgage, where by the agreement, the judgment is taken as collateral merely; and even where there is no agreement it is exceedingly doubtful whether it will have that effect. The case of *Butler vs. Miller*, (1 Denio, 407,) reviewed and questioned.¹

A creditor who takes a mortgage of personal property from his debtor, to secure his debt, in good faith and without any notice of an improper design on the part of the mortgagor, will be protected, although the object and design of the mortgagor in executing the same was to delay, hinder and defraud his other creditors.²

A., a manufacturer, purchased wool to be paid for by his note, indorsed by B. The note was made accordingly and indorsed by B. for A.'s accommodation. At the same time A. executed to B. a writing, reciting that B. had indorsed the note to be used in purchasing the wool, and declaring that the wool and the cloth to be manufactured therefrom, should belong to B. until the note was paid. *Held*, that the writing was a mere mortgage, and not having been filed as such in the proper town clerk's office, that it was void as against a subsequent purchaser in good faith from A.³

A mortgage of goods may be valid between the parties without writing. A personal mortgage must be filed, and consequently *in writing only* where the rights of creditors and purchasers in good faith are concerned.⁴

Where there was a provision in a chattel mortgage that the mortgagor should remain in possession until default in payment, unless he or some other person should attempt to sell, assign, remove or otherwise dispose of the property.

¹ 23 Wend. 659; 4 Hill, 271; *Butler vs. Miller*, 1 Comst. 496; 1 Hill, 438, and many cases cited by Johnson, J.

² *Hale vs. Arnold*, 15 Barb. 599.

³ *Thompson vs. Blanchard*, 4 Comst. 303; 17 Wend. 492.

⁴ 4 Comst. R. 497.

Held, that the seizure before default, of the property on a distress warrant, for rent due from the mortgagor, entitled the mortgagee to the immediate possession, and that after demand and refusal, replevin would be against the bailiff from the wrongful detention.¹

Where a chattel mortgage contains no agreement to pay the sum secured thereby, and no recital or declaration of indebtedness from the mortgagor to the mortgagee, no action will lie by the mortgagee upon the mortgage to recover the debt secured. A covenant in a chattel mortgage that the mortgagor will warrant and defend the property, is merely a warranty of title, not that the mortgagor will forever keep the property or protect it.²

If a chattel mortgage is filed in the clerk's office of the town in which the mortgagor resided at the time of its *execution*, that is sufficient, whether the mortgagor be a resident of that town, at the time of *filing* the mortgage or not. The statute contains no direction as to the time within which a chattel mortgage shall be filed, and in the absence of any such provision, the courts have no power to supply the deficiency or to declare a mortgage void, because of its not having been filed at the time it was executed. Yet if creditors, or *bona fide purchasers* should acquire rights in the property mortgaged, before the filing of the mortgage, the lien of the mortgagee would be postponed to such rights.³

Parol proof of extrinsic circumstances may be given, to apply a description to its subject matter, and if it appears that the description is in some respects erroneous, those parts may be rejected, and what is left, if sufficient of itself, alone be regarded. A chattel mortgage recited an indebtedness of the mortgagor to the mortgagee, in the sum of \$2,809, the amount of two promissory notes, made by the mortgagor and indorsed by the mortgagee, which the latter had taken up and paid, and for the indorsement of another note to K. for \$1,000. *Held*, that parol evidence might be received to show that another note for \$600, made by the

¹ 4 Kernan, 23.

³ 17 Barb. 523.

² 14 Barb. 242; 3 Comst. 264.

mortgagor was one of the notes referred to in, and secured by the mortgage, although such note was not indorsed by the mortgagee; it appearing that the note was payable to the order of B., who indorsed the same and it was discounted by the mortgagee. *Held also*, that a paper upon which a computation of the amount of the three notes was made, at the time of executing the mortgage, was one of the extrinsic circumstances admissible upon the question of identity. The filing of a chattel mortgage by a clerk in the store of the town clerk, having charge of the town clerk's office, in the absence of that officer, *is valid*.

Where a chattel mortgage described, among other property mortgaged, one four horse post coach, called "Steuben," and another called "Mayday," at H. employed in staging, it appearing that the mortgagor, at the time the mortgage was executed, owned and possessed only two four horse post coaches, one called "Conhocton," and the other called "Mayday," and that there was no coach called "Steuben," at H. or employed in staging there. *Held*, that parol evidence was admissible to show that the coach named "Conhocton" was intended to be included in the mortgage, instead of the "Steuben."¹

In order to prove the contents of a chattel mortgage, on the trial the original mortgage must be produced. A certified copy made by the clerk or register when the mortgage is filed is evidence only of the fact of its filing.²

The mortgage, in good faith, of chattels is the absolute owner at law of the property mortgaged, and the interest of the mortgagor therein is merely the right to pay off the mortgaged debt; his possession is that of a bailee only. He has no interest subject to sale on execution.³

When a chattel mortgage is not filed until after the delivery of an execution to the sheriff it is void as against the latter, although actually filed before a levy has been made.⁴

A chattel mortgage upon the merchandise and stock in

¹ Dodge vs. Potter, 18 Barb. 193; ² George vs. Toll, 39 How. 497.

Cow. & Hill's notes, 1423, 4; 4 ³ Baltes vs. Rapp, 3 Keyes, 210; 38 Metc. 80; 21 Wend. 651; 12 Pick. How. 296.

557; 9 Barb. 360.

⁴ Hale vs. Sweet, 40 N. Y. 97.

trade of the mortgagor expressed to include the increase and decrease thereof is wholly void.¹

Before a chattel mortgage can be properly and legally upheld as a valid security, where there has been no actual and continued change of possession of the property mortgaged, the party asserting its validity must establish affirmatively *two propositions*; first, that the transaction was *bona fide*; second, that there was no intention to defraud creditors or purchasers, and it is not enough to show the mortgage was given for a good consideration. It is equally necessary to prove the absence of a fraudulent intent. It has been well settled, that these are distinct and independent facts, and that the proof of the one in no degree alters or lessens the obligation of proving the other, but the same kind of evidence given to establish the one is also pertinent to establish the other, and these questions are proper for the consideration of the jury, whose decision will be as final and conclusive as upon any other question of fact, as we have before seen.²

Of Pledges.

A *Pledge* is where goods are delivered by a debtor to his creditor, to be retained until his debt be discharged. It differs from a mortgage. In a mortgage, the title of the property mortgaged passes from the mortgagor to the mortgagee, subject to be defeated if the condition is performed. In a pledge, the title remains in the bailor, and the bailee has only a special property. An actual delivery is necessary to render a pledge valid.³

Possession of the property is essential to the existence of a pledge, but the possession may be according to the nature of the subject.

Where the property is not capable of manual delivery, and possession, e. g., shares of stock in an incorporated company, a pledge may be created by a written transfer thereof, and the transaction may be a pledge instead of a

¹ 5 Abb. U. S. 442.

³ Story on Bail, 197.

² Groat vs. Rees, 20 Barb. 26, Harris, J.; 3 Sandf. S. C. R. 69.

mortgage, although the *legal title* pass to the creditor. The transfer of the legal title is not in any case inconsistent with a pledge if the debtor has a right to the restoration of the property on payment of the debt at any time, although after it falls due.

A creditor, having personal property pledged to him by his debtor as security for the debt cannot sell the same until he has first demanded payment of the debtor.

And the rule is the same, although the debt is payable presently and without demand, and although by the terms of the pledge the creditor may sell at public or private sale without giving notice to the debtor.

Where the pledgee has wrongfully sold the pledge so that he cannot restore it, the pledgor is not bound to tender the debt in order to entitle himself to maintain the action for the wrongful sale.¹

When goods or chattels shall be pledged for the payment of money, or the performance of any contract or agreement, the right and interest in such goods of the person making such pledge may be sold on execution against him, and the purchasers shall acquire all the right and interest of the defendant, and shall be entitled to the possession of such goods and chattels, on complying with the terms and conditions of the pledge.²

A sheriff, holding an execution against a pledgor, may, by virtue thereof, take the property pledged out of the hands of the pledgee into his own possession, and sell the right and interest of the pledgor therein. After the sale by the officer in such a case, the pledgee is entitled to the possession of the property until the purchaser redeems it from the pledgee. Whenever a power is given by the statute, everything necessary to make it effectual or requisite to attain the end in view is implied. So when the law commands a thing to be done, it impliedly authorizes the performance of all acts necessary to the execution of the command. (*Stief vs. Hart*, 1 Comst. 20.)

A pawnee of goods does not acquire an absolute title

¹ *Wilson vs. Little*, 2 Comst. 443. ² 2 R. S. 866, § 20.

simply by a failure of the pawnee to pay a debt or redeem the property at the time *specified*. His interest is a special property to retain the goods for his security. There is no forfeiture until the pawnor's rights are foreclosed, (*Cortelyou vs. Lansing*, 2 *Caine's Cases in Error*, 200; 8 *John. R.* 97; *Id.* 472; 12 *Id.* 146; 1 *Powell on Mort.* 3; 2 *Kent's Com.* 577,) and after a foreclosure and sale the surplus money, after paying the pledgee's claim, belongs to the pledgor.¹

The mere pledging a note does not pass the title as a sale or mortgage does. (12 *John.* 146; 5 *Id.* 258.) In the case of a pledge the title remains with the pledgor. In case of a mortgage the title passes at law, although in equity it is considered as a mere lien.²

At common law a pledge is defined to be a bailment of personal property as a security for some debt or engagement. (*Story on Bailment*, § 286.) It is said that the law makes a distinction between the case of a pledge for a debt payable immediately, and one where the debt does not become payable until a future day, and that in the latter case the creditor is not bound to call for a redemption or to give notice of sale, though in the former it is conceded that there must be such demand, and that notice must be given. Non-payment of the debt at the stipulated time did not work a forfeiture of the pledge either by the civil or at common law. It simply clothed the pledgee with authority to sell the pledge and reimburse himself for his debt, interest and expenses, *and the residue of the proceeds of the sale then belonged to the pledgor.*

The law now is, that the pledgee may file his bill for a foreclosure and proceed to a judicial sale, or he may sell without judicial process, upon giving reasonable notice to the pledgor *to redeem* and of the intended sale.³

If the pledgor, in consequence of any default of the pledgee, or of his conversion of the pledge, has by any action recovered the value of the pledge, the debt in that

¹ *Brownell vs. Hawkins*, 4 *Barb.* 491. ³ *Stearns vs. Marsh*, 4 *Denio*, 230.

² 1 *Barb. R.* 9.

case remains and is recoverable unless in such prior action it has been deducted. By the common law the pledgee in such an action brought for the tort has a right to have the amount of his debt *recouped* in the damages.¹

The right and interest of a pledgor cannot be sold on execution unless the goods be present and within the view of those attending the sale. Where the right and interest of a pledgor is levied on, the sheriff may take actual possession of the goods, and hold them until he sells. After the sale, however, the pledgee is entitled to the possession of the goods until the purchaser redeems them.²

It is now well settled that an action can be maintained for the conversion of a chose in action which has been pledged as security for a debt.³

An action to redeem is not the only remedy, and where the pledgee has wrongfully disposed of the pledged property, it is a conversion for which an action will lie to lay the foundation of an action against the pledgee *for conversion* of the thing pledged as security for a note payable on a fixed day, the debtor's offer and demand must be made on the day of maturity, though it would be otherwise of an action to redeem.⁴

Pledges may now be foreclosed. See statute in another part of this work before Justices of the Peace.

Of Fixtures.

The authorities upon this branch of the law are very numerous. It has employed the minds and pens of many men of acknowledged learning and ability. Yet, whoever essays to study and make himself master of the subject, will not be surprised to find that neither the elementary writers, nor the reported cases, furnish any precise or certain rule to determine what a fixture is. Where so much has already been written, I do not hope to contribute anything to the store of useful learning.

¹ Id. 232; 15 Mass. R. 389; Story on Bailment, § 315, 349. ³ Luckey vs. Gannon, 37 How. 134, and cases cited.

² Bakewell vs. Ellsworth, 6 Hill, 484. ⁴ Butts vs. Burnett, 6 Abb. N. S. 302.

I shall do no more than barely allude to a few of the leading cases as authority for my present opinion. In *Walker vs. Sherman*, (20 Wend. 636,) where most of the English cases are collected and commented upon, this court decided between tenants in common, that carding, spinning, and shearing machines, and looms in a woolen factory, which had passed with the estate from one owner to another, for the space of eleven years, were no part of the realty. (*Swift vs. Thompson*, (9 Conn. R. 63,) was a controversy in respect to cotton machinery, fastened to the floor by wooden screws, and there the court held the same opinion.

Gale vs. Ward, (14 Mass. R. 352,) involved the right of certain carding machines in a woolen factory, moved by leather bands, over pulleys, in connection with the water power; and the court held the machines to be personal property. The unfriendly comments and unfeigned doubts to which *Gale vs. Ward* has been subjected in some of the subsequent cases, tend more to expose the uncertain and unsettled state of the law of fixtures, than to impugn the soundness of its conclusions.

In *Winslow and others vs. The Merchants' Insurance Co.*, (4 Metc. 306,) a decision upon which the plaintiff places much dependence, the same court decided that the engines and boilers, and the machinery for working iron which they operate, considering the manner in which they were fitted and adapted to the mill, were fixtures. Chief Justice Shaw, who delivered the opinion, deems it necessary, however, to disclaim all design to overturn or impair the force of the decision in *Gale vs. Ward*, in the following words: "The case of *Gale vs. Ward*, (14 Mass. Rep. 352,) is not, we think, an authority opposed to this opinion, because it is manifest that the court in that case regarded the carding machines, although ponderous and bulky, as essentially personal property, which might have been attached, and removed as the personal property of the owner, even though there had been no mortgage, and they had been erected by the owner in his own mill and for his own use. From the description given of the manner in which the engine and boiler in *Winslow and others vs. The Merchants' Insurance*

Co. were fastened to the building in which they were erected, there can hardly be a doubt, that they were fixtures within the principles of the reported cases. And in respect to the machines for working iron which they operated, it is evident the question was determined upon the way in which they were fitted and accepted to the mill. The words, 'fitted and adapted to the mill,' are frequent expressions. They mean something more, I apprehend, than simply being set down upon one of the floors of the building; or such fitness and adaptation as they would have had upon being removed and set down upon the floor of any other building. And if they mean more than that, the decision in no wise conflicts with those to which I have referred. The general rule extracted from all the cases laid down in *Walker vs. Sherman*, is this: In order to come within the operation of a *deed* conveying the freehold, whether by metes or bounds of a plantation farm, lot, &c., or in terms denoting a mill or factory, &c., nothing of a nature personal in itself, will pass unless it be brought within the denomination of a fixture, by being some way permanently, or at least habitually attached to the land, or some building upon it. I do not think that leather bands or belts, connecting the machines for the mere purpose of motion, with the permanent mill gearing, would have converted the chattels into real property."¹

The policy which has created exceptions to the general rule, that whatever is affixed to the freehold cannot be removed, without the consent of the owner of the inheritance, applies as well to erections for agricultural and other purposes as to erections for the purposes of trade. To constitute a fixture there must be such an annexation as to render removal impossible without injury to the freehold. Any general rule as to what constitutes a fixture is liable to exception. But the first question must be, whether the erection be a part of the freehold. If it be not united to the freehold, it cannot be said that it is a part of it, and in that case, therefore, it is not a fixture.

¹ 10 Barbour, 157; Brown, J.

And the annexation which will convert personal into real estate, is not affected by placing the chattel upon, or even by affixing it to the land. It must be affixed to the freehold.

The law of fixtures is in derogation of the original rule of common law, which subjected everything affixed to the freehold to the law governing the freehold, and it has grown up into a system of judicial legislation, so as to almost render the right of removal of fixtures a general rule instead of being an exception.¹

A tenant making improvements, which by the agreement he has the right to remove, may make such removal after his term expires, while he still remains in possession of the premises. And the right of removal not having been in such case abandoned by the tenant, the landlord cannot maintain an action for the removal. The rule, that if a fixture is not removed during the term, and the tenant quits the premises, and the landlord subsequently takes possession, the fixtures becomes a part of the freehold, and the party who was tenant cannot legally take it away afterwards, *seems to have its foundation* in the presumption of abandonment, arising from the conduct of the tenant where he quits the premises, leaving his fixtures behind him. This presumption can never arise while the tenant remains in possession.²

Buildings and fixtures erected by a tenant for the purposes of trade, belong to him and are removable without the consent of the landlord.³

Poles, used necessarily in cultivating hops, which were taken down for the purpose of gathering the crop, and piled in the yard with the intention of being replaced in the season of hop raising, are a part of the real estate.⁴

Looms, placed upon the floor of a woollen factory, and fastened to such floor by means of screws in each loom, are a permanent and essential part of the woollen factory, and the mortgagee of such factory and machinery will hold

¹ 10 Barb. 496, Harris, J.

² Id.

³ 1 Comst. R. 570; 20 John. 30; 6

Cow. 665, and cases cited.

⁴ Bishop vs. Bishop, 1 Kernap, 123;

2 Hill, 142.

such looms, by virtue of his mortgage, in preference to a creditor of the mortgagor who has levied upon the same by virtue of an execution against the mortgagor.¹

Fencing material on a farm, which have been used as a part of the fences, but are temporarily detached, without any intent of diverting them from their use as such, are a part of the freehold, and pass by a conveyance of the farm to a purchaser. So, as to manure lying in a barnyard on the farm at the time of the conveyance, and this, though it may be laid up in heaps.²

It seems that rails built into a fence by a tenant under an agreement that he may remove them from the land, are as *between* such tenant and owner of the soil personal property.

Where machinery is actually annexed to the land it will be presumed to have been so attached with a view to the permanent improvement or beneficial enjoyment of the freehold, and will be deemed a fixture and part of the realty in the absence of proof that the attachment was merely for the purpose of steadying and adjusting the machine, or that the intention at the time existed, not afterwards abandoned, that the annexation should not be permanent in its character, or that there is some agreement or relation of parties inconsistent with the supposition that a permanent annexation was intended. In determining the question whether a particular article is a fixture or not, the intention of the party who attached it to the realty is an important element to be considered.³

The more sensible rule in regard to what are to be deemed fixtures seems to be that if the articles are essential to the use of the realty, and have been applied exclusively to use in connection with it are necessary for that purpose, and without such or similar articles the realty would cease to be of value, then they may properly be considered as fixtures, and should pass with it.⁴

¹ 2 Denio, 174; 6 Barb. 370; 10 Barb. 157, 457; 20 Barb. 407, Johnson, J.; 19 Barb. 317; 12 Barb. 143.

² 2 Hill, 142; 15 Wend. 169; 21 Pick. 367.

³ Potter vs. Cromwell, 40 N. Y. 287.

⁴ Hoyle vs. Plattsburg R. R. Co., 51 Barb. 45, and cases cited.

Of Estoppels.

Where the owner of goods stands by and without objection allows another to treat them as his own, and a third person is thereby led to purchase them in good faith, the owner cannot recover such goods or their value from the purchaser. And the same doctrine, it seems, applies, although the party who allows another to assume the credit of ownership is not actually present when the act is done, by which the third party is deceived.¹

A judgment of a court of competent jurisdiction upon a question directly involved in the suit is conclusive in a second suit between the same parties, depending on the same question, although the subject matter of the action be different.²

Where an assignee takes a chose in action by assignment, made with the debtor's assent, and on the faith of what is said by him at the time, the debtor is estopped from impeaching it by any defence inconsistent with his declaration.³

Acting under bad advice, in the adoption of an erroneous proceeding, will not estop a party.⁴

An estoppel to be binding must be reciprocal and binding on both parties, and the acts relied on as an estoppel must have been intended to have actually *had* an influence on the conduct of him who asserts the estoppel.⁵

Where a party with knowledge of all the facts expressly reaffirms a contract, he is estopped from afterwards disaffirming it by the principle of estoppel *in pais*.⁶

Admissions and conduct operate as estoppels only when they are *designed* to influence the conduct of another and *actually have that effect*.⁷

It is a familiar principle in all courts that if a person maintains silence where in conscience he ought to speak, equity and good conscience will debar him from speaking where conscience requires him to be silent..⁸

¹ 4 Comstock, R. 303.

² 4 Comstock, 71.

³ 2 Comstock, 278.

⁴ 10 Barbour, 97.

⁵ Id.

⁶ Id. 406.

⁷ Id. 432.

⁸ 9 Barb. 17, 32; 2 John. R. 589; 14 John. 43.

A person entering upon premises under the title of another is estopped from controverting his landlord's title at the time he entered; but not from showing that the title afterwards passed from his landlord to another person.¹

Estoppels *in pais* generally consist of acts, declarations, or admissions, which have been acted upon by others, and are conclusive against the party making the declarations, &c., in all cases between him and the person whose conduct he has thus influenced.²

It is of the essence of this species of estoppel that the representation or act should have *influenced* the conduct of the individual setting up or alleging it.³

To create an estoppel *in pais* a party must do an act or make an admission inconsistent with the claim he proposes to set up, and the other party must have acted upon the admission *and will be injured* by allowing *the truth of the admission* to be disproved. The act or admission must have been expressly designed to influence the conduct of another, and must in fact have influenced such conduct.⁴

The doctrine of estoppels, legal as well as equitable, has been so frequently and fully discussed in the recent cases in this country and in England that a review of the cases, or an elaborate discussion of the principle, would be out of place.

The doctrine of equitable estoppels to the extent to which it is now carried is comparatively of modern origin, or in other words, by the recent decisions it has been extended to cases in which it would not have been applied at an earlier day. As there is no pretence of a technical or legal estoppel, which must be by deed or matter of record, it is with this equitable estoppel or estoppel *in pais*, growing out of the acts and declaration of the party sought to be estopped, that we have to do in this case. Such estoppels are applied for the prevention of fraud, and only exist to prevent injury where equity and good conscience require that the party

¹ 9 Barbour, 615.

² Id.

³ Id.

⁴ Otis vs. Sill, 8 Barbour Rep., 102.
Paige, J.

should not be heard to gainsay his acts or declarations by which another person has been influenced in his conduct.¹

To create an estoppel which shall preclude the party from alleging the truth, it must appear,

1st. That he has made some declaration, or done some act inconsistent with the truth, *with a design to influence the conduct* of another.

2d. That the party alleging the estoppel was ignorant of the truth, and relied upon and acted upon the faith of such acts or declarations; and

3d. That an injury will result to him if the other party shall be allowed to gainsay them. (Robinson vs. Nathan, 1 Camp. 245; Greenl. Ev. § 27; Parker vs. Barker, 2 Met. 423, 431; Welland Canal Co. vs. Hathaway, 8 Wend. 483; Tufts vs. Hays, 5 N. Hamp. R. 458; Stevens vs. Baird, 9 Cowen, R. 274.)

I think these cases establish the true rule. (Martin vs. Angel, 7 Barb. 417.)

The judgment of a court of competent jurisdiction upon a point litigated between the parties is conclusive in all subsequent controversies where the same point comes again in question between the same parties. (White vs. Coatsworth, 2 Selden, 137.)*

Before a party is concluded it must appear,

1. That he has made an admission which is clearly inconsistent with the evidence he proposes to give, or the title or claim which he proposes to set up.

2. That the other party has acted upon the admission; and

3. That he will be injured by allowing the truth of the admission to be disproved.²

Of Assignments.

A general assignment by a debtor of his property, in trust for the benefit of a particular class of his creditors,

¹ Greenl. Ev. § 207.

² 12 Barb. 128; 3 Hill, 221.

* NOTE.—So is the verdict of a jury in summary proceedings by a landlord to remove a tenant for non-payment of rent.

reserving the surplus to himself, is *fraudulent and void*, and it makes no difference whether the surplus be large or small, or whether there be none at all.

And where the assignor is insolvent the assignment, it seems, will be deemed fraudulent and void, although the trust embraces only *a part* of his property. Such cases, it seems, are within the statute, (2 R. S. 135, § 1,) declaring all conveyances, transfers, &c., in trust for the use of the person making the same, to be void as to creditors. But neither the principle nor the statute applies where the assignment is to *creditors themselves*, for the purpose of securing their particular demands. Such a transfer, whatever may be its form, is in legal effect only a mortgage, and creates but a specific lien in the property assigned. The residuary interest of the assignor may be reached by legal process, or bill in equity, according to the nature of the interest or of the property. Accordingly, where an insolvent debtor assigned a chose in action to certain of his creditors, for the purpose of securing their demands, reserving the surplus to himself, there being no extrinsic evidence of an intention to defraud other creditors, *Held*, that the assignment was valid. (*Leitch vs. Hollister*, 4 Comst. 211, Gardiner, J.)

An assignment of property in trust, for the payment of the debts of the assignor, directed the assignees to take possession of the premises forthwith, and *within a convenient time as to them should seem meet*, by public or private sale, for the best price that could be procured, to convert the property into money, &c. The assignment also contained a clause authorizing the assignee to ask, demand, sue, &c., and compound and agree for all, or any part of the debts due and owing to the assignor, as the assignees should deem meet, *Held*, that the assignment was fraudulent in law and in fact, and therefore void as against creditors.¹

An assignment executed by a man in embarrassed or insolvent circumstances of his property in trust for the benefit of creditors is valid, if it unconditionally and absolutely devotes the whole of the assigned property to the payment

¹ *Woodburn vs. Mosher*, 9 Barb. 255.

of his debts, provided it be made without any intent to hinder, delay, or defraud his creditors. And if such assignment is valid in its creation, no subsequent fraudulent or illegal acts of the parties can invalidate it.

Although the appointment of the assignor, as his agent, by the assignee, to collect the choses in action assigned, is to be regarded with suspicion, yet that circumstance alone will not afford sufficient evidence of an original intent, on the part of the assignor and assignee, or of either of them, to defraud creditors.

The right of creditors to set aside a fraudulent sale and transfer of his property, made by a debtor, will not be taken away by a subsequent voluntary assignment made by such debtor of his property and effects to a trustee, for the benefit of certain preferred creditors.¹

An assignment by an insolvent debtor of his property to trustees, for the benefit of his creditors, which authorizes the trustees to convert the property into money, or *available means*, is fraudulent and void as against the creditor of the assignor; for authorizing the trustees to convert the property into *available means*, as contradistinguished from money, is equivalent to empowering them to sell it on a credit.²

A voluntary assignment to a trustee, for the benefit of creditors, containing a provision that the trustee shall not be accountable for any loss sustained by the trust property, unless it shall happen from gross negligence or wilful misfeasance, is void. An assignee under a voluntary assignment, being entitled to a compensation for his services, in the execution of the duties of his trust, is chargeable with the care and diligence of a provident owner, and liable for a loss occasioned by ordinary negligence.³

A trustee is entitled to commissions upon all sums paid out by him in the execution of his trust at the same rate as executors and administrators receive for their services.⁴

An assignment, by insolvent debtors, of their property to

¹ Litchfield vs. Pelton, 6 Barb. 187. ³ Willis on Trustees, 125; 2 Kent's
² Brigham vs. Tillinghast, 3 Kernan, Com. 7th ed. 280; 3 Selden, 438.
215; 2 Seld. 510; 1 Kernan, 302; ⁴ 9 Paige, 398; 2 R. S. 98, § 58, and
12 Barb. 168. p. 153, § 22; 2 Comst. 372.

trustees, for the benefit of their creditors, *authorizing* the trustees to sell the assigned property upon credit, is fraudulent and void as against the creditors of the assignors.^{1*}

A provision in an assignment made by an insolvent debtor, for the benefit of his creditors, authorizing the assignee to sell and dispose of the assigned property, *upon such terms and conditions as, in his judgment, may appear best*, and convert the same into cash, is not an authority to sell on credit, and therefore will not vitiate the assignment, (*Whitney vs. Krows*, 11 Barb. 198; *Kellogg vs. Slawson*, 15 Barb. 56; 19 Id. 176; 1 Kernan, 302,) but a provision, authorizing the payment of "a reasonable counsel fee," to the assignee, in addition to the expenses, costs and commissions of executing the trust, is an appropriation of the property to an illegal purpose, and renders the assignment void as to creditors, and so far as the validity of such a provision is concerned, it is immaterial whether the assignee is, or is not, an attorney or counsellor at law, the court holding that an insolvent assignor cannot give to his assignee any portion of the estate for his services, beyond the fixed legal rate of compensation.²

An assignment, made by a debtor, of his property, with the fraudulent intent to hinder, delay and defraud his creditors, is void, although his assignees are free from all imputation of participating in his fraudulent designs, and they are themselves *bona fide* creditors of the assignor, and are to take the entire avails of the assigned property to pay their preferred debts.³

Where it appears either by recitals, in an assignment or otherwise, that the assignor supposed himself solvent, and made the assignments to prevent a sacrifice of his property, it will be held fraudulent, the intent to hinder and delay

¹ 2 Selden, 510. Gardner, J.

² 21 Barb. 65, Parker, J.; 2 Comst. 365.

³ 4 Sand. Ch. R. 552; 18 Barb. 272;

17 Id. 388; 2 Paige, 54; 1 Sand. 85; 10 Pick. 408.

* NOTE.—In this case, the counsel (Beardsley) collected a large number of cases relative to fraudulent assignments and classified them.

creditors being apparent. An inventory of property is not indispensable.¹

An assignment of real estate for the benefit of creditors upon trust *to sell or mortgage, &c.*, is valid, although that part which authorizes the assignee to mortgage *is void*.²

Bills of sales and assignments stand upon the same footing, except that assignments are to receive a more favorable construction. And where a bill of sale, proved to have been given for a true debt, was assailed as fraudulent in respect to the vendor's creditors, and there was some evidence of an immediate change of possession of *a part* of the property, &c. *Held*, a question for the jury.³

The fact of retaining possession by the assignor is not conclusive evidence of fraud, but only *prima facie*, and may be rebutted by evidence.⁴

Since the case of *Smith & Hoe vs. Acker*, (23 Wend. 653,) the jury may allow almost any excuse for continuance of possession in the vendor or mortgagor, and the court have no power to set aside the verdict, because of the excuse being insufficient.⁵

Where the validity of a sale of chattels depends upon whether it was made with *intent* to defraud creditors, however clear and conclusive the evidence of fraudulent intent may be, the judge is bound to submit the case to the jury.⁶

The question whether an assignment is void on the ground of its having been made with *intent* to defraud creditors *is for the jury*.⁷

The statute of 1860 (ch. 348), requires the schedule to be made by the assignor, as a necessary part of a valid assignment, and it is a prerequisite to vesting an absolute title to the property in the assignee. The title vested in the assignee, prior to such schedule being made, is merely inchoate, and will be good if perfected by a compliance with sections two and three of said act within the time limited,

¹ 15 Barb. 56, and cases cited by Allen, J.

² 22 Wend. 483; 24 Id. 641; 7 Paige. 521, and cases cited.

³ 1 Hill, 467, 483; 23 Wend. 653; 11 Id. 240; 2 Barb. S. C. 381.

⁴ 23 Wend. 656, 7; 5 John. 258; 8 Id. 452; 20 Wend. 507.

⁵ *Prentiss vs. Slack*, 1 Hill, 467, and cases cited; *Handford vs. Archer*, 4 Hill, 271; *Bradish*, 299.

⁶ *Vann vs. Philips*, Shff. 6 Hill, 438

⁷ *Goodrich vs. Downs*, 6 Hill, 438.

but not otherwise. When the assignor having failed to comply with the conditions required by sections two and three of the above act, makes a new assignment in *good faith* and for a valuable consideration, such new assignment will transfer a good title to the assignee.¹

As the United States bankrupt law is now in force, which seem to annul general assignments, especially those preferring creditors in the payment of debts, it is deemed unnecessary at this time to extend this subject any farther in this work.

Of Husband and Wife.

By the common law, a married woman could not convey her lands by deed, either with or without the concurrence of her husband.

But by the usages and laws of the colony of the State of New York, a married woman may convey her lands or any interests she may have in lands, by deed duly acknowledged, and such conveyance is valid, *although her husband do not join therein.*

By the common law, the only mode in which a married woman could alienate her lands was by fine or recovery.

In Equity, a married woman is regarded a *feme sole* in respect to her *separate estate*, and she may dispose of such estate, it seems, without the solemnity of an acknowledgment or private examination. Such disposition is in the nature of an appointment. But a wife's *separate estate* is an equitable estate merely, and where the legal title is vested in some other person for her benefit, to the exclusion of her husband.

The legal estate which a wife has in reversion in lands where the husband has disposed of his life estate as tenant by the curtesy to a third person, is not a *separate estate*.²

A divorce dissolving the marriage contract on the ground of the adultery of the husband, does not deprive the wife of her right of dower in his real estate.³

¹ *Juliand vs. Rathbone*, 39 N. Y. 196, 24 Comst. R. 9.
369; 42 Barb. 284; 38 N. Y. 9, 293. ² *Id.* 95.

Marriage is a civil contract, and all that is essential to its validity is a *present agreement* between the competent parties, to take each other for husband and wife. And the agreement may, like any other fact, be proved either by direct or circumstantial evidence.

On an indictment for bigamy, the prior marriage must be established by direct proof, and evidence of cohabitative reputation, &c., is not admissible.

It seems, however, that such evidence is competent where the crime of bigamy only comes collaterally in question, as where the proceeding is to recover a legacy, and the right to it depends on the question of a valid prior marriage.¹

Where an obligation is taken to the husband and wife, or to the wife alone with the husband's assent, it survives to the wife as against the representatives of the husband, and this is the rule at law as well as in equity. In such cases, the form of the security implies a design on the part of the husband to benefit the wife, and the law will give effect to the intention, where the interest of creditors is not affected.²

A gift by a husband to his wife will be upheld when the rights of creditors are not in question.³

To entitle a husband to an estate as tenant by the curtesy, the wife must be seized in fact and in deed. It is not sufficient that she has a seizin in law of an estate of inheritance.

Hence, if there be an outstanding estate for life, the husband cannot be tenant by the curtesy of the wife's estate in reversion or remainder, unless the particular estate be ended during the coverture.⁴

A *separate estate* of the wife is one that she has such dominion over as to exclude the marital rights of the husband.⁵

The act of April 7, 1848, for the more effectual protection of the property of married women, was not intended to deprive the husband of his estate as tenant by the curtesy of his wife's real estate, in case of his surviving her.

Since that statute, the husband during coverture, has no

¹ 4 Comstock, 230.

² Id. 284.

³ Id.

⁴ Taylor vs. Gould, 10 Barb. R. 388.

⁵ Id. 597.

interest in the wife's lands which he can use or transfer, or which his creditors can in any manner reach.

The estate is vested in the wife during coverture, and upon her death after issue born leaving her husband surviving, it descends to her heirs, charged with his rights as tenant by the curtesy. If there has been no issue of the marriage, then the estate becomes perfect and absolute in her heirs.¹

A wife can be a witness against her husband in a criminal proceeding when he is charged with committing or threatening an injury to her person. Upon an indictment against the husband for using criminal means, as subornation of perjury, to wrong her in a judicial proceeding, she cannot be a witness on the part of the people.²

A voluntary purchase by the husband, in the name of his wife, will be fraudulent as against antecedent creditors, in like manner as if the settlement was of property actually vested in the husband. (Watson vs. LeRow, 6 Barbour, 481.)

In an action by husband and wife, brought to recover damages for an injury to the person of the wife, the defendant is at liberty to prove that the act complained of was done by the consent and request of the wife, and if such facts are proved they will constitute an entire defence.³

A wife may act as the agent of her husband, and if he permits her so to act in any particular business he adopts and is bound by her acts and admissions in reference to such business, and they may be given in evidence against him.⁴

It is abundantly settled by authority that, with respect to her separate estate, a *feme covert* is to be regarded in equity as a *feme sole*. In Jaques vs. The Methodist Episcopal Church, (17 John. Rep. 548,) this doctrine was fully sustained, and the Court for the Correction of Errors there decided that where a trustee held property for the separate use of a *feme covert* she might dispose of it even without the consent or concurrence of her trustee, and that though a

¹ Hurd vs. Cass, 9 Barb. 580.

² Hurd vs. Cass, 9 Barb. 366.

³ Pillow vs. Bushnell, 5 Barb. 156.

⁴ 4 Barbour, 222.

particular mode of disposition be specially pointed out in the instrument or deed of settlement, it would not preclude her from adopting any other mode of disposition, unless there were *negative* words restraining her power of disposition, except in the very mode pointed out. This equitable doctrine has been repeatedly applied by the courts of this State. (4 Barb. 413 ; 7 Paige, 14, 112 ; 20 Wend. 570 ; 10 Paige, 346 ; 11 Paige, 475.)

The Legislature at its late session, (1857,) amended the 114th section of the Code so as to read as follows :

§ 114. When a married woman is a party her husband must be joined with her, except that :

1. When the action concerns her separate property, she may sue alone ;

2. When the action is between herself and her husband, she may sue and be sued alone, and in no case need she prosecute or defend by a guardian or next friend.

According to the foregoing amendment, it would seem that in a suit *against* a married woman, concerning her separate estate, her husband should be made a party defendant with her, as the first subdivision only authorizes her to *sue* alone.

Since the act of April 7, 1848, for the more effectual protection of the property of married women, where a married woman conveys her real estate acquired since the passage of that act, the deed may be executed and acknowledged in the same manner, and be in the same form as if she were unmarried. She need not acknowledge the execution of the instrument on a private examination or apart from her husband, or acknowledge that she executed the same without any fear or compulsion of her husband.¹

It is now provided by the Code of Procedure, (§ 274,) that in an action brought by or against a married woman, judgment may be given against her as well for costs as for damages, or both for such costs and for such damages, in the same manner as against other persons, to be levied and collected of her separate estate and not otherwise. In any pro-

¹ Blood vs. Humphrey, 17 Barb. 660, Mason, J. ; 5 Barb. 474 ; 11 How. Pr 486 ; 10 Id. 109.

ceeding to enforce such judgment, the Supreme Court shall have jurisdiction, though the amount be less than one hundred dollars.

It is also provided that, (§ 287,) an execution may issue against a married woman, and it shall direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise.

Where a married woman is the owner, in her own right, of a leasehold interest in a city lot, and her husband makes a contract in his own name for the erection thereon, which is erected under the contract, and the price paid, principally from moneys raised from incumbrances placed upon the property, for that purpose by such married woman, and before the completion of the building she leases the property covenanting in the lease to complete the building, described precisely as in the building contract, these circumstances are sufficient, in an action by the contractor, to recover from her the price of extra work done upon the building by direction of her husband, to authorize a jury to find that he directed such extra work as her authorized agent, and in her behalf.¹

Judge Grover says: The separate estate of a married woman was chargeable, in equity, for the payment of a debt contracted by her for the benefit of such estate before the passage of the act of 1860, protecting and enlarging the rights of married women. (*Yale v. Dederer*, 22 N. Y. 450; *Owen v. Cawley*, 36 Id. 600; *Robbins v. Dillaye*, 37 Id. 35.) And since the passage of that statute such debts may generally be recovered out of such separate property in like manner as if the wife were sole.

There is nothing in the marriage relation which forbids the wife to employ her husband as her agent in the management of her estate and property, and such employment does not subject her property, or the profits arising from such business, to the claims of the creditors of her husband.²

The promissory note of a married woman *not given* for the benefit of her separate estate cannot, by parol, be made a

¹ *Fowler vs. Seaman*, 40 N. Y. 592; ² *Merchant vs. Bunnell*, 3 Keyes, 37 N. Y. 38; 36 N. Y. 600. 539; 1 Keyes, 53.

charge upon it. Where money is borrowed by the husband upon notes given by the wife, his testimony that he represented to the lender that his wife wanted the money to improve her real estate is inadmissible. It seems that before her estate can be charged in such case, it must appear that she authorized the declarations, or that the money was expended for the benefit of her estate, or perhaps both.¹

In an action against a married woman for trespass, committed by her cattle upon the lands of the plaintiff, her husband need not be joined as a party defendant.²

In this State, so far as its validity in law is concerned, marriage is a civil contract, and no religious form or ceremony of any kind is essential to its validity. All that is requisite is that the parties should be capable of contracting, and that they should *actually contract* to be man and wife. This agreement may be written or verbal, with or without witnesses, and may be proved verbal like any other contract. When proved to the satisfaction of a Court of Justice, it constitutes a lawful marriage. Either party may be a witness to prove the marriage.³

In the case of the Corn Exchange Insurance Co. vs. Armina Babcock, recently decided in the Court of Appeals, not yet reported, the Court (Hunt, J.) decided that :

Where a married woman, possessed of separate real estate, indorsed notes as surety for her husband, without consideration, and without benefit to her separate estate, which indorsement purported in terms to charge her separate estate with payment, *Held*,

1st. That an action on such indorsements, the complaint in which sets forth, in addition to the ordinary allegations, the coverture of the defendant, a separate estate in her, and her intent to charge such estate is maintainable.

2d. That an ordinary pecuniary judgment in such action as upon a personal contract is proper.

3d. That in order to make the indorsement of a married woman, in such case, a charge upon her separate estate, all

¹ Decker vs. Johnson, 2 Keyes, 348. ³ Bissell vs. Bissell, 55 Barb. 325; 15

² Rowe vs. Smith, 38 How. 87; 55 N. Y. 345; 25 N. Y. 390.

Barb. 417.

that is necessary is her declaration in the contract of indorsement or instrument creating the charge of her interest so to charge her separate estate. The charge need not be in such form as to create a specific lien.

It is well settled that a transfer of lands made by *the husband to the wife*, through the medium of a third person, vests, if fairly and honestly made, the title to them in the wife. The validity of such a transfer must be tested by the same circumstances of good faith, solvency, and interest, by which a voluntary conveyance, made before the passage of the married woman's act, by a husband for the declared purpose of providing for his wife out of his estate would have been tested.¹

Where it is found as a matter of fact that such a transfer of the lands was made by the husband in good faith, without any intent to defraud, and as a just provision for his wife out of his estate, the wife, by virtue of the act of 1860, holds the same to her sole and separate use free from the control of her husband or liability for his debts.

Whether the married woman's act has abrogated the technical rule of the common law, that the husband cannot convey directly to his wife, nor the wife to the husband, there seems to be some conflict of judicial opinion upon that point.

Insolvent Discharge.

The statute under which insolvent proceedings are taken, declares the effect of a discharge to be as follows :

"The original discharge, the record thereof, duly authenticated, shall be *conclusive evidence* of the proceedings and facts therein contained." (2 R. S. 38, § 19.) Notwithstanding this strong language, the constant course of adjudication has determined that the facts upon which the *jurisdiction* of the officer depends, may be inquired into by a party seeking to impeach the final order in a collateral action, and if a defect is ascertained the whole proceeding is declared void.²

¹ Barnum vs. Farthing, 40 How. 25;
2 Abb. N. S. 220; 37 How. 481.

² Barber vs. Winslow, 12 Wend.
102; VanAlstine vs. Erwine, 1

Kernan, 331, and cases cited; Morgan vs. Dyer, 10 John. 161; Sackett vs. Andros, 5 Hill, 327; Var-num vs. Wheeler, 1 Denio, 331.

The recitals in a discharge are held to be *prima facie* evidence of only jurisdictional facts, (Jenks vs. Stebbins, 11 John, 224,) but these are subject to be disproved. The rule, therefore, is that where the officer is shown to have acquired jurisdiction, the discharge reciting the performance of the subsequent statutory requirements is incontrovertible evidence that they have been performed as stated, but it is not in the power of the officer to create such evidence unless he has, in the first place, acquired a right to proceed in the case by the performance, by the party invoking his action, of the preliminary steps required by law to be taken, as a condition to his entertaining the case.¹

To confer jurisdiction on the officer, the schedule of the insolvent creditors, annexed to his petition, should state the amount owing to each creditor therein named, and where the schedule was in blank as to the sum owing to one of his creditors therein named, *Held*, that this was a jurisdictional defect, which rendered the discharge void, notwithstanding it recited that *two-thirds* in amount of the creditors united in the petition, and that it satisfactorily appeared to the officer that the insolvent had in all respects complied with the requirements of the statute.²

The jurisdiction of any court exercising authority over a subject may be inquired into in any court where the proceedings of the former are brought by a party claiming the benefit of them.³

A State bankrupt law, authorizing the discharge of an imprisoned debtor from imprisonment, and also from his debts, is void, only as to the provision discharging the debt of a creditor residing out of the State; the discharge from imprisonment affects the creditor's remedy only, and is not in conflict with the Constitution of the United States.⁴

An assignment, by a debtor, of all his estate to trustees for the payment of his debts, is, against the debtor, conclusive evidence of his insolvency at the time of its execution.⁵

¹ Stanton vs. Ellis, 2 Kernan, 575, ⁴ 8 Selden, 500.

Denio, J.

² 2 Kernan, 575; 1 Id. 331; 16 Barb. 319.

³ 4 Selden, 254.

⁵ Morehead vs. Hollister, 2 Selden, 809; 1 Peters, 438, and cases cited; 1 Selden, 106, and many cases cited.

Mechanics' Lien Law.

By an act of the Legislature, passed May 4, 1870, chap. 558, it is provided that: Any person who shall hereafter perform any labor, or shall furnish any materials in erecting, altering or repairing any house, building, or the appurtenances to any house or building, in either of the counties of this State, (except the counties of Erie, Kings, Queens, New York and Onondaga,) shall, on filing in the office of the county clerk of the county in which the property is situate, the notice prescribed by the 4th section of this act, as the same shall be hereby amended, have a lien for the value of such labor and material upon such house or building and appurtenances, and upon the lot, parcel or farm of land, upon which the same shall stand, to the extent of the right, title and interest of the owner of the property existing at the time of filing the said notice. The 4th section of said act as amended, reads as follows :

§ 4. Within sixty days after the performance and completion of such labor, or the final furnishing of such materials, the contractor, subcontractor, laborer, or persons furnishing materials, shall file a notice in writing in the clerk's office of the county where the property is located, specifying the amount of the claim and the person against whom the claim is made, the name of the owner of the building, and if in a *city or village*, the situation of the building, by street and number, if the street or number be known. The county clerk shall enter the particulars of such notice in a book to be kept in his office to be called the Lien Docket, which shall be suitably ruled in columns, headed, "claimants," "against whom claimed," "owners," "buildings," "amount claimed," and the date of the filing of the notice, hour and minute, what proceedings have been had. The names of the owners and persons against whom the claims are made shall be entered in said book in alphabetical order. A fee of ten cents shall be paid to said clerk on filing said lien, and no lien shall attach to said land, buildings or appurtenances unless such notice be filed by said clerk,

¹Laws, 1873, chap. 489, sec. 4.

and said notice, when so filed, shall thereafter operate as an incumbrance upon said property.

The provisions of the laws relating to mechanics' liens, heretofore passed, shall apply to bridges and trestle work erected for railroads, and materials furnished therefor and labor performed in constructing said bridges, trestle work and other structures connected therewith, and the time within which said liens may be filed, shall be extended to ninety days from the time when the last work shall have been performed on said bridges, trestle work and structures connected therewith, or the time from which said materials shall have been delivered.¹

It will be observed the foregoing is only an amendment of the acts of 1854 and 1858, and shall only insert in this treatise those parts applicable to Justices' Courts.

Proceedings in Justices' Courts to enforce Lien.

Justices' Courts of the town where the premises are situated, have jurisdiction in those proceedings where the amount of the lien is two hundred dollars or under.²

Contractor or Laborer's Notice of Lien.

To the County Clerk of the county of

Take notice, that I, _____, a resident of (*the village or town as the case may be,*) in the county of _____, have a claim against (C. D.,) of the town of (or village,) _____, amounting to the sum of _____ dollars and _____ cents, with interest thereon from _____ for two months, (or for materials furnished as the case may be,) for him, _____. That the said labor was performed and said materials were furnished in erecting a dwelling house, (*or repairing the house or other buildings, or appurtenances, according as the facts are,*) on the premises of the said C. D., situate on Main street, in the village of _____, and known as No. _____, (*or if the town, describe it as well as you can,*) and thirty days have not

¹ SESS. LAWS, 1870, chap. 529.

² LAWS OF 1854, page 1088.

elapsed since the performance and completion of such labor, (or since the materials were furnished.) That the said C. D. is the owner of the said building and appurtenances, and the lot and premises upon which the same stand, which said lot and premises are situated in the village (or town) of aforesaid, and are described as follows, (describe the premises.) Also take notice, that I have and claim a lien upon the said building and appurtenances, and the lot upon which the same stand, as security for the amount due me as aforesaid, in pursuance of the statute in such case made and provided.

A. B., *Claimant*.

Dated , *January* 10, 1871.

The right to acquire a lien is personal, being confined to the party performing the labor or furnishing the materials, and therefore an assignee of the claim cannot acquire a lien under the statute.¹

The notice of lien is required by statute to be in writing, and must specify *the amount of the claim* and against whom the claim is made, the name of the owner of the building, and the situation of the building by street and number, if practicable.

To save the plaintiff's rights and prevent the equities of third persons arising, the plaintiff should, after he has commenced his action, cause a copy of his notice, which he serves on the owner, to be filed with the county clerk, that an entry may be made upon his docket of the commencement of the action.

Under this mechanics' lien law, the claimant, by filing his notice with the proper clerk, acquires a lien which (*unless sooner discharged*,) continues one year. The lien then ceases.²

But if in this year proceedings are commenced under this act to enforce or foreclose said lien, then said lien shall continue until judgment is rendered thereon and for one year thereafter.

¹ 4 Abb. 263; 3 E. D. Smith, 632.

² See Laws of 1873, chap. 489, sec. 20.

³ Huxford vs. Bogardus, 40 How.

94; 3 N. Y. 305.

The action is commenced by the service of a notice upon the *owner or his agent*, requiring the owner to appear before a Justice of the town in which the property is situated.

The notice must contain a statement of the facts constituting the claim, and the amount thereof, and must require the owner to appear before the Justice, in person or by attorney, at a time certain, not less than twenty days after such service, and answer the same ; or, in default thereof, that the claimant will take judgment against the owner for the amount so claimed to be due, with interest thereon and costs.

At the time of the service of the notice a bill of the particulars of the amount claimed to be due from the owner, his contractor, or subcontractor, verified by the oath of the claimant, or his attorney, to the effect that the same is true, must be served upon the owner or his agent. (§ 10.)

Form of Notice.

In *Justices' Court*, before Francis Butler, Esq., Justice.

A. B., claimant,	}	To C. D., above named.
vs.		
C. D., owner.		

Take notice, that I, A. B. above named, residing within the county of _____, have a claim against you amounting to the sum of _____ dollars and _____ cents, with interest thereon from the _____, it being for two months labor performed for you as mason, and for four thousand brick, and (*as the case may be,*) the same being fully set forth in the bill of particulars hereto annexed, and which labor was performed and materials furnished in erecting _____, (*or as the case may be,*) upon the premises situate (*here describe them,*) on Washington street, in the village of New Hartford, (*in the town of New Hartford,*) in said county ; the said lot upon which said buildings (*or appurtenances, as the case may be,*) is bounded and described as follows : (*Describe them as well as you can.*)

Also, take notice that, within thirty days after the performance and completion of such labor, (or furnishing of such materials,) to wit : on the _____ day of _____, 18____, I duly filed with the county clerk of the said county of _____

¹ See N. Y. Rev. Stat. sec. 8, art. 2, p. 792.

the notice required by law to effect a lien on the building and premises above mentioned, owned by you as aforesaid, for the amount claimed as above stated, to wit: the sum of .

You will, therefore, also take notice that you are required to appear in person, or by attorney, before F. Butler, Esq., a Justice of the Peace in and for the town of New Hartford, at his office, in the said town of New Hartford, on the day of next, at 10 o'clock in the forenoon, and answer this notice; or, in default thereof, I, the said claimant, will take judgment against you for the amount claimed as aforesaid, to wit: the sum of \$, and interest thereon from the day of , 1870, with costs.

Dated, &c.

A. B., Claimant.

To C. D., owner, or his agent.

The time must not be less than thirty days.

Claimant's Bill of Particulars.

Bill of particulars referred to in the annexed notice :

C. D. to A. B., contractors.

1870.

Dec. 8. To days' mason work on your house, \$

" 5,000 brick furnished for same,

" 600 loads sand, at

Dated, &c.,

\$

ONEIDA COUNTY, ss.

A. B., being duly sworn, says he is the above named claimant, (or agent of ,) and that the bill of particulars above mentioned is, in all respects, true.

Subscribed and sworn, &c.

A. B.

The notice and bill of particulars may be served upon the owner, or his agent, anywhere within the State, and they must be served personally, unless by reason of absence from the State, or being concealed therein personal service cannot be made, in which case the service may be made by leaving a copy of the notice and bill of particulars at the owner's last place of residence, and publishing a copy of the notice,

for three weeks successively, in a newspaper published in the county where the property is situated. (§§ 9, 10.)

The bill of particulars need not be published with the notice.

Form of Affidavit of Service of Notice.

ONEIDA COUNTY, ss.

I. D., being duly sworn, says that on the day of , 1871, he personally served a copy of the within notice and bill of particulars upon C. D., the owner mentioned therein, by delivering the same to, and leaving the same with the said C. D. at his residence, in the town of , in said county, and that he knew the person so served to be the person mentioned and described in said notice as owner and defendant therein.

Subscribed and sworn, &c.

In case the owner does not appear, as required by the notice served, then, on filing with the Justice an affidavit of the service of the notice and bill of particulars, and the failure of the owner to appear as therein required, the Justice may assess the amount of the plaintiff's claim. (§ 11.)

Form of Affidavit of Owner's Default.

(Title.)

ONEIDA COUNTY, ss.

A. B. above named being duly sworn says that he is the plaintiff, (or attorney of plaintiff,) in the above action. That this action was commenced to enforce a lien against real property owned by the above named defendant, and the notice commencing the same is returnable before Francis Butler, Esq., Justice of the Peace, at his office in the town of , on the day of , 187 , at 10 A. M., as will more fully appear by said notice hereto annexed.

Deponent further says that the said C. D. has not appeared before the said Justice, as required by said notice, and that one hour and over has elapsed since the time fixed in said notice for the appearance of said defendant.

Subscribed and sworn, this, &c.

Upon the assessment by the Justice, judgment shall be

entered for the amount of the lien, with costs and exemptions ; shall thereupon issue, in the same manner as in other cases, excepting the execution ; shall direct the officer to sell the right, title, and interest which the owner had in the premises at the time of filing the notice, prescribed by the statute. (§ 11.)

On the appearance of the parties before the Justice, issue may be joined, the defendant interposing any valid defence he may have to the claimant's claim, or any set-off he has against the claimant ; in other words, the cause is to be tried and governed by the same rules as other issues in Justices' Courts. (§ 12.)

The costs and disbursements are to be allowed to either party, the same as in other actions, and which will be found in the fee bills, under their appropriate heads, in this work. Either party may appeal from the judgment rendered by the Justice the same in all respects as in ordinary actions, and the appeal is to be heard, governed and determined upon the same principles.

A co-tenant, who is not a party to the contract with the mechanic, and has no interest in the work done, is not liable under the contract, nor is his share of the property subject to the builder's lien.¹

No lien upon premises, under the mechanics' lien law of 1854, can be acquired by the builder of a house upon a lot of land owned by the minor daughter of the defendant, although the defendant, in his contract for such building, claimed to own the lot.²

The statute gives a lien only against the *owner* to the extent of his interest upon a house and upon the land on which it stands, for labor and materials, &c.

Internal Revenue Stamps.

It seems that where a United States revenue stamp is left off of an instrument by mistake, without any intention to evade the provisions of the act of Congress, not only is the instru-

¹ Otis vs. Cusack, 43 Barb. 546.

² Copley vs. O'Neil, 39 How. 41; 19 N. Y. 234.

ment not void, but *it may be read in evidence without any stamp*.¹ (This is adverse to *Beebe vs. Hutton*, 47 Barb. 187.)

Where a stamp has been left off of an instrument by mistake, application to the collector to allow the stamp to be affixed, and to remit the penalty, may be made not only by the person executing the instrument, but also by any person having an interest therein. (This is adverse to *Myers vs. Smith*, 48 Barb. 614.)

Where the application to the collector is not made by the maker of the instrument, but by another party having an interest therein as payee or holder of a note or the like, the *proper district* in which the application is to be made, is the district in which the party making the application resides, although the maker may reside in another collection district.

The court, in the above case, say: As I understand the several acts of Congress, it is nowhere provided that an instrument, (which is not otherwise void,) shall not be used in evidence by reason of its having no stamp upon it, and as it is not made so by the act, it must therefore be valid and effectual.

An objection to an instrument or other contract, that it is not stamped as required by the revenue laws, is unavailing, unless the party objecting proves that the stamp was omitted *with intent* to evade the act of Congress.²

Under section 158 of the stamp act of June 30, 1864, the omission to affix a proper stamp, does not avoid an instrument unless such omission was *with intent* to evade the provisions of the act.³

A promissory note not stamped with a United States revenue stamp when made, but the maker authorized the attorney, who held the note, to put on the stamp and cancel it, which the attorney neglected to do, until several months thereafter, through inadvertance and not with any intention

¹ *Schermerhorn vs. Burgess* and ³ *New Haven Co. vs. Quintard* 37. others, 38 How. 123; 55 Barb. 422; How. 29; 50 Barb. 302. 39 How. 515.

² *New Haven and Northampton Co. vs. Quintard*, 6 Abb. N. S. 128; 53 Barb. 382.

to defraud the government,—*Held*, that the note was properly stamped.¹

It has been held repeatedly that the omission to affix a proper stamp to an instrument does not avoid it unless such omission was with intent to evade the provisions of the law.²

Partnership.

A partnership is defined to be a contract of two or more persons, to place their money, effects, labor, or skill, or some or all of them in lawful commerce or business, *and to divide the profits and bear the loss in certain proportions*. And to constitute a partnership in a single concern, there must be a joint understanding *to share in the profit and loss*.³

It matters not whether they are publicly known as partners. And if one permits another to use his name and credit as a partner, and hold him out as jointly liable with himself, or if he represents that he is such partner, he will become liable for the debts contracted upon the supposed partnership account, as fully as if he were interested in the business.⁴

An agreement between two persons, by which both are to share in the profits of an adventure or business, but that one shall not be liable for the loss, is not a partnership.⁵ So an agency, where the agent is paid out of the profits a certain sum, or a proportion of them, constitutes no partnership. In such case, however, if the business is conducted in their joint names, the parties would be deemed partners as to third persons.

The essential feature of a partnership being a community of profits and losses between the partners, it matters not how they contribute to the joint business or enterprise. One may give his services and another his capital, one may give capital and services, and another capital or services, or each may give both capital and services. Thus where one agreed

¹ *Vaughan vs. O'Brien*, 39 How. 515. ⁴ *4 Paige*, 148.

² 47 Barb. 187; 50 Barb. 302; 53 Barb. 382. ⁵ 3 John. R. 353; *Story on Partnership*, § 20.

³ 1 Selden, 186; 3 Kent's Com. 5th ed. 23; 18 Wend. 580; 2 Bing. 108; 16 Barb. 309.

to fill a lime-kiln and another to burn it ; where one agreed to furnish a weaving shop, loom and tackle, and the other to weave, the fact that each was to receive a share of the profits rendered them partners. In another case, where A. let to B. a manufacturing establishment, which B. was to carry on, A. making advances for the stock, and to sell the goods manufactured, and have over and above the advances a profit of one per cent a yard for all the cloth made, not exceeding six thousand yards a week, and B. to have the balance of the profits on the six thousand yards and the entire profit of all goods made beyond the six thousand yards, it was held that the agreement providing for a share of the profits as profits constituted a partnership.¹

Each partner in ordinary cases, and in the absence of fraud on the part of the purchaser, has the right of disposing of all the personal property and debts of the partnership, and is considered the authorized agent of the other partners. He may assign the partnership effects in the name of the firm to any one of its creditors in payment of his debt, although the effect will be to prefer him to other creditors ; but an assignment of all the effects of the firm, made by one partner against the wishes of his copartner, to a trustee for the benefit of the firm creditors in equal proportions, is illegal.²

Each of the partners is liable for articles furnished for the benefit of the firm, although the vendor does not know of the existence of the partnership, and supposes that he is dealing with and giving credit only to an individual partner, and charging him alone on his books. And it makes no difference if the sale was by a written agreement, signed by the vendor and the partner in his individual name only.³

A note given by one of the partners, in the name of the firm, will be intended to have been made in the course of partnership dealings, and the burden of proof is upon the other partners to do away this intendment, by showing that the note was given in a matter not within the scope of the partnership business, and that, with the knowledge

¹ 5 Denio, 180; 5 Wend. 274.

³ 5 Denio, 180; 5 Mass. 183.

² 5 Paige, 30.

of the payee. Where, however, upon the renewal of an accommodation note, the borrower presented to his endorser, for signature, a note signed by him, with the name of his firm as makers, of which firm he had recently become a member, the endorser was held chargeable with notice that the note was given for the individual debt of the borrower.¹

In case of the *dissolution of a copartnership* actual notice of the dissolution must be brought home to all persons with whom the firm has had *dealings*, to protect, as to *such persons*, one partner from the acts of another in the use of the partnership name after dissolution.²

One partner cannot bind another by a submission of matters arising out of the firm business to arbitration, for the reason that there is no implied authority except such as is necessary to carry on the joint business. Where, however, an award on such a submission is made, and the partner making the submission accepts the award and gives the person paying it a receipt in full, the receipt operates as a release of the partnership claim, by way of award and satisfaction.³

Prior to the adoption of the Code of Procedure, the only action at law that could be brought by one partner against another in relation to the partnership transactions, was an action of account. That was not within the jurisdiction of a Justice of the Peace. The Code, by giving a Justice jurisdiction of "actions arising on contracts for the recovery of money only, if the sum claimed do not exceed one hundred dollars,"⁴ it is supposed has not varied the jurisdiction in relation to this class of cases.

One of several partners may assign a chose in action due to the firm, *e. g.*, on account. Such an assignment will be valid and operative, though under seal.⁵

One partner has authority to sell and transfer all the copartnership property and effects, directly to a creditor of the

¹ 11 John. 544; 6 Wend. 615; 14 Id. 183; 15 Id. 364; 16 Id. 505; 17 Id. 524; 18 Id. 466.

² 2 Kernan, 283; 22 Wend. 183, the Chancellor.

³ 3 Bing. 101; 1 Pet. 221; 19 John. 187; 1 Wend. 326.

⁴ Code of Procedure, § 53; 4th ed. R. S. vol. 2, p. 488.

⁵ 5 Hill, 163, affirmed in the Court of Errors, in 7 Hill, 585.

firm in payment of a debt, without the knowledge or consent of his copartner, although the latter is at the place of business of the firm and might be consulted. Nor is such transfer invalid, although the firm is insolvent, and thereby the one creditor acquires a preference over the other creditors of the firm.¹

An authority for one partner to subscribe the firm name as accommodation sureties for a third person, may be shown by circumstances.²

Where the creditor has knowledge of the dissolution of the firm of copartnership at the time of giving credit, he cannot recover from the members of the firm who have withdrawn, no matter how the knowledge has been communicated to him.³

Either member of the partnership may secure one of its creditors by a transfer of property, and this may be done by an assignment, in the nature of a mortgage, with a trust to account for, and repay the surplus, if any.⁴

Where a partnership debt is settled, the firm creditor receiving one-half in cash and the individual note of one of the partners, indorsed by the other for the other half, the debt, as a firm debt, is discharged.⁵

A retiring partner, who conceals his withdrawal from the firm, and permits the remaining members to contract in the old firm name, is liable to those who give them further credit on the faith of the continuance of the partnership.⁶

The parties to a copartnership may give it any name they please, and all contracts, obligations, or notes made with, or given to such firm, may be prosecuted in the individual names of its members.⁷

Where a note is made by one partner, in the name of the firm, for his own use, the firm are liable upon the note to one who discounts it, where usury is not established, *unless*

1 2 Kernan, 442, Hand. J.; 5 Paige, 30; 3 Sandf. 284, 293; 7 Paige. 26. 5 Gaudolpho vs. Appleton, 40 N. Y. 533.

2 Butler vs. Stocking, 4 Selden, 408. 6 Buffalo City Bank vs. Howard, 35 N. Y. 500.

3 Davis vs. Keyes, 38 N. Y. 94.

4 M'Clelland vs. Reinsen, 5 Abb. N. S. 250. 7 Crawford and others vs. Collins and others, 45 Barb. 269.

the holder had notice that the proceeds were not to be used for the benefit of the firm.¹

A participation in the profits of a business by a party, as a compensation for his labor or services, without having an interest in the stock or in the profits as such, does not make him a partner.²

Parent and Child.

A step-father is not entitled by the law to the custody or services of the children of his wife by a former husband, nor is he bound to maintain them.³

When a minor makes a contract for his services on his own account, and the father knows of it and makes no objection, *it seems* there is an implied assent that the son shall have his earnings.⁴

As against the mother of a bastard child, the putative father has no legal right to its custody. The mother, as its natural guardian, is bound to maintain it, and is entitled to the control of it.⁵

A father has no authority, arising from his paternal relation alone, to commence a suit in behalf of his daughter, for an assault and battery committed on her. And he can neither release nor compromise her right of action for personal injury.⁶

Although a father is entitled to the services of his child, during the minority of the latter, yet he may waive that right by emancipating the child. Or the child may, by his father's consent, become entitled to receive the fruits of his labor for his own use.

The intention of the father to emancipate his minor child is a question of fact, and, in the absence of direct proof, may be inferred from circumstances. In determining that question in a suit brought by a person to recover for work and labor done by him while a minor, the circumstances that he

1 *Mechanics' Bank vs. Foster*, 44 Barb. 87. 4 10 Barb. 300.

2 *Conklin vs. Barton*, 43 Barb. 435. 5 6 Barb. 366.

3 3 Comst. 312; 5 Barb. 122. 6 4 Barb. 453.

has been in the habit of working for others and receiving pay for his labor himself, and that another infant child of the same parent has done the same without objection by the parent, may properly be taken into consideration.

Where a father was absent for several years, leaving his infant son to manage for himself, the father contributing nothing to his education or support, and not interfering in his engagements, *held*, that the emancipation of the infant might be presumed, and that he was entitled to recover in his own name for work and labor done by him during his minority.¹

A father is not liable for the wilful act of his minor child, *e. g.*, for setting her father's dog upon the plaintiff's hog, which was thereby bitten and killed. But the daughter is herself answerable for the injury. Nor is the father liable as owner of the dog, without proof that he knew it was accustomed to do mischief.²

Our law recognizes no general authority in a father to dispose of his children, except for some specific and temporary purpose, such as apprenticeship during the father's life, or guardianship after his death.³

Parents are under an obligation to support their children and are entitled to their services during their minority. But, says Chief Justice Savage, in *McCoy vs. Huffman*, (8 Cowen R. 85,) although the father is entitled to the services of his children till the age of twenty-one, yet he may waive that right. (*Burlingame vs. Burlingame*, 7 Cowen, 92.) He may emancipate his child, or the child may, by his father's consent, be entitled to his services. So also it was remarked by Sutherland, J., in *Shute vs. Dorr*, (5 Wend. Rep. 206,) that such intention of a parent may be inferred from circumstances, and when circumstances of any particular case warrant the conclusion, that it was understood that the child might receive his earnings, payment to him will be good. We subscribe fully to these sentiments as being just and reasonable. The reason why parents are entitled to the

¹ 3 Barb. 115.

³ 3 Hill, 399

² *Tift vs. Tift*, 4 Denio, 175.

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services of their minor children, usually given, is that which I have already mentioned, the liability to support them. But in my opinion a much stronger reason, and one more consonant with the feelings and obligations of parent and child, is that it gives the parent the control over the actions of his children, when they are incapable of judging for themselves, and thus has a tendency to save them from the effects of idleness or imprudence. But when a parent from confidence in his minor child, or as is sometimes the case, (*although I hope not often,*) from indifference as to his welfare, allows the child to manage for himself and to obtain his support from his own industry, the reasons for the rule fail, and the rule falls with them.

The liability of a father to furnish necessities for his minor and invalid children, who are members of his family and unable to support themselves by their labor, depends upon principles analogous to those which govern the relation of husband and wife.¹

The Legislature has provided that it shall be necessary for the parents or guardians of such minor children to notify the person employing them, that they claim their wages, or payment to the minor, is valid. The statute is as follows :

§ 1. It shall be necessary for the parents or guardians of such minor children as may be in service, to notify the party employing such minor, within thirty days after the commencement of such service, that said parent or guardian claim the wages of said minor, and in default of such notice payment to such minor shall be valid.²

Alteration of Instruments.

An alteration, apparent on the face of a note, is not presumed by the law to have been made after its execution. It is, however, for the jury to decide ; 1 Halstead R. 215; 24 Wend. 374; 2 John. cases 198, 200,) and where there are strong circumstances to induce a suspicion that a note has been fraudulently altered, general corroborating circumstances may be admitted in evidence to strengthen the sus-

¹ Cromwell vs. Benjamin, 41 Barb. 558. ² Sess. Laws, 1850, chap. 266, § 1.

picion, as that often notes drawn and endorsed by the same parties, to take up one of which the note in question was made, had been altered. And either party may show the circumstances attending the alteration of a note, for words may be added to it after its delivery, or by a stranger, or under such circumstances as not to constitute a part of the contract.¹

The insertions of the words "or order" in a promissory note after execution, is a material alteration and destroys its validity.²

But in 3 Esp. R. 245, where there was a mistaken omission of the words "or order" in a bill indorsed by the defendant, Le Blanc, J., put it to the jury on very slight circumstances to infer the assent of the defendant, who was indorser, that the omitted words should be inserted.

Where a material alteration appears to have been made in a deed of which no note was made at the time of the execution thereof, it is incumbent upon the party, claiming under such deed, to show that the alteration was made before the deed was executed. But the question as to the time when the alteration was made, is one of fact to be decided by the jury.³

It seems, however, that where there is a mere interlineation in a deed, without anything to excite suspicion, that it was not made at the time that the deed was drawn and executed, the reasonable presumption is, that it was made before the deed was executed.⁴

It has long been a disputed point whether the burden of explaining an alteration, apparent upon a paper, devolved upon the party seeking to enforce it, or the party sought to be charged. It would seem that in some of the States an alteration not peculiarly suspicious, must be presumed to have made before execution. (11 Conn. Rep. 531; 1 Halstead, 215; Cowen & Hill's Notes, 298, 1317, &c.) But when the alteration is suspicious, and beneficial to the holder of the paper, the more sensible rule prevails, at least in this State and in England, that the presumption is against the party

¹ 10 Pickering, 228.

² 1 Cow. Tr. 187.

³ 8 Barb. 514; 15 John. 293.

⁴ 22 Wend. 388; 24 Id. 374.

who sets up the paper, and he is required to explain it before he can recover, (2 Wend. 555, Vide also note to Waring vs. Smith, 2 Barb. Ch. Rep. 119.) As I understand the rule, it is always a question for the court to decide, whether a paper is proper to be read in evidence to the jury. The reason of the rule is most emphatically applicable to the cases already cited. It is not unusual for the judge to reject the altered paper and direct a nonsuit. In the case of Penny vs. Corwithe, (18 John. 499,) a submission was offered in evidence, but it appearing that a black line had been drawn through the name of one of the parties, since its execution, the Judge refused to permit it to be read in evidence, unless the plaintiff showed that the erasure had been made by the consent of the parties. The plaintiff then offered to prove the fact, but the Judge rejected all evidence on that point, except that of the *subscribing witness*, and nonsuited the plaintiff, and for this last ruling a new trial was granted. So in the case of the administrators of Prine vs. Tallman, (1 Coxe, 447;) a bond was produced, and the subscribing witness stated that there had been a writing at the foot of the bond which had been cut off. The court would not permit the bond to be read in evidence, although the plaintiff offered to prove the contents of the writing torn off, and to satisfy the jury that it was immaterial. The plaintiff was nonsuited.

In Knight vs. Clements, (8 A. & E. 215,) a bill of exchange was offered by the plaintiff, but it appeared that the word "three" had been blotted, and "two" written upon it. The court held that the plaintiff was bound to explain it *by evidence*, and that the jury would not infer from the appearance of the bill that the alterations had been made when the bill was drawn, and *a nonsuit was ordered*. (See also 2 Starkie's Rep. 313; 5 Bingham, 183.) That it is a question for the court when objection is made to the admissibility of the evidence, is shown by the case of Ross vs. Gould, (5 Greenleaf, 204; 1 Greenleaf Ev. 599.)

The order in which proof is to be received at the trial, is within the discretion of the Judge, and an abuse of that discretion cannot well be corrected by bill of exceptions.

Whether the explanation or the deed should be first given in evidence, belonged to the Judge at the Circuit to determine. They could not both be given at once.

It was formerly held that the alteration of a deed in a material point, even if made by a stranger to the parties concerned, and without the knowledge of either of them, whether by an interlineation, addition, erasure or striking out a part with a pen, or by tearing off its seal, rendered it absolutely void.¹ The rule has, however, been modified so as to confine its operation to cases where the alteration is by one of the parties to it;² and when the act is done by a stranger and without the privity of either party, it does not avoid the instrument.³ If the alteration is made by a party in a material part in one covenant, it avoids all the covenants in the deed; but where the covenantors are bound severally, tearing off one seal does not discharge the other covenantors, for it is a distinct deed as to each.⁴

The addition of the name of another person to a several note as maker, without the knowledge or consent of the original signer, is not such a material alteration as will avoid the note.⁵

Thus where a note made by S., payable to W. or bearer, was delivered to W., who thereupon applied to the plaintiff to advance the money on it, and the plaintiff consented to do so if he (W.) would sign his name to it, or become responsible to pay the same, whereupon W. signed his name to the note under S., and delivered the same to the plaintiff, who let him have the money thereon. *Held*, that adding the name of W. to the note did not vitiate it.⁶

Where a note, payable with interest generally, and executed by a surety, was, after the execution thereof, by agreement between the principal and the payee, but without the knowledge or assent of the surety, altered by an addition thereto, making the interest payable *semi-annually*. *Held*,

¹ 11 Coke, 23.

² 8 Cowen, 73.

³ 15 John. 297; 6 Cow. 746; 8 Id. 71.

⁴ 5 Coke, 23.

⁵ Brownell vs. Winnie, 29 N. Y. 400; 31 Barb. 441.

⁶ 10 N. Y. 198; 27 N. Y. 29; overruling, 23 Barb. 584; Chappell vs. Spencer.

that was a material alteration, which rendered the note void as to the surety.¹

Of Payment.

It has been decided by our Supreme Court, and may now be considered the settled law of the State, that whether a bill or note be given for precedent, or cotemporary debt, the question of payment is the same, and in either case, unless the bill or note be *received under an express agreement that it shall operate as payment*, the law will not so adjudge it. And where an agent buys goods for his principal, and gives his own notes, they are considered, so far as the question of payment is concerned, as the notes of the principal.²

It has been decided in numerous cases, that when a bill or note is delivered on account of a *precedent* debt, that it is not a payment unless it is expressly agreed to be received as such by the *creditor*, and that he should run the risk of its collection and it now applies as well to *cotemporaneous* as precedent debts.³

It is decided that the promissory note of a debtor given for a precedent simple contract demand will not operate as payment so as to preclude the creditor from suing on the original consideration, though given under an express agreement that it was to be received in full satisfaction and discharge. *Otherwise, if it is the note of a third person.*⁴

So the giving of a promissory note by one of several partners or joint debtors, for a demand antecedently due from all, will not extinguish their liability, though the creditor expressly accept the note in satisfaction. The case of *Cole vs. Sacket*, (1 Hill, 516,) reconsidered and approved.⁵

A draft or bill of exchange upon a third person, given by a debtor to a creditor who stipulates that it shall be *in full satisfaction* of the debt *when paid*, is *prima facie* evidence

¹ Dewey vs. Reed, 40 Barb. 16; 19 John. 391; 24 Wend. 374. ³ 5 John. 68; 7 Id. 311; 9 Id. 310; 11 Id. 513; 5 Hill, 200.

² Porter vs. Talcott, 1 Cow. R. 359; ⁴ Cole vs. Sackett, 1 Hill, 516.
9 Id. 23. ⁵ 5 Hill, 448, and cases cited.

of payment of the original debt. And to rebut such evidence the creditor is bound to show in an action for the recovery of the original debt, diligence in obtaining payment of the bill, and, if not paid, notice of non-payment, or he must excuse the non-presentment and produce the bill, on the trial, to be cancelled.¹

A payment in counterfeit bank bills is a nullity, and will not discharge the debt, though both parties suppose them to be genuine; so if payment in the genuine bills of a bank which has failed, neither party being aware of the fact; but in these cases the party receiving the bills must return them within a reasonable time after discovering their worthlessness, or he will be obliged to sustain the loss. The party should return them immediately after discovering they are worthless.²

Taking the note of a third person for an existing debt, is not a satisfaction, unless the creditor agrees to take it in payment. (*Vail vs. Foster*, 4 Comst. 312.) The law is well established, that the acceptance by a creditor of the note of a third person, in full satisfaction of an existing debt, is an extinguishment of the original indebtedness, though the note so taken is for a less sum than the whole debt. Otherwise, where the note of the debtor himself is taken.

Where the note of a third person is taken in full satisfaction of a debt, on condition that such note shall be paid at maturity, and not otherwise, if the note is not paid when due, the creditor may insist that the contract is broken and claim the whole debt or original amount.

But if the creditor waives the forfeiture and retains the note, and finally receives the full amount of it from the maker, he cannot afterwards proceed against the debtor for the balance of the original demand. A forfeiture for non-payment at an appointed day is waived by subsequently accepting a payment upon the demand. (*Conkling vs. King*, 10 Barbour, 372.) A payment in current bank bills, if accepted by the sheriff without objection, is a good payment

¹ 23 Wend. 345.

² *Thomas vs. Todd*, 6 Hill, 340, *Bronson, J.*

for the purpose of redeeming real estate sold on execution. (9 Barb. 17.) Where upon an agreement for the sale of property no time of payment is specified, the legal inference is, that it is to be upon the delivery of the property, and the vendor is not bound to part with his property without receiving his price. And if in lieu of payment on delivery, security on the part of the purchaser is stipulated for, the vendor is not obliged to deliver the property until the security is given.¹

Where a creditor accepts the individual obligations of one of several partners or of a third person, and thereupon gives up notes of the partnership, such obligations will not be considered as anything more than the conditional payment of an existing debt, unless it is proved that they were *agreed* to be taken absolutely as payment of such debt.

The question always, in such cases, is whether the creditor agreed to and did accept the notes, either of the debtor or of a third person, as *payment* of the original debt. If he did not, the original debt is not discharged, and the remedy upon it is only suspended until the maturity of the notes received.²

Payment of a judgment by one of the several defendants extinguishes it, though the party paying take an assignment of it to himself; and the judgment is extinguished, though it was against the maker and several endorsers of a promissory note, and the payment was made by the last endorser who endorsed the note for the accommodation of the maker. A court of law is not competent in such a case to substitute the party making the payment for the plaintiff.³

A debtor paying money to a creditor to whom he owes several debts may appropriate it to which he pleases. In default of an appropriation by the debtor, the creditor has a right to make the application. If both omit to do it, and the demand consist of a running account, the presumption is, that the first items of the account were intended to be satisfied. And where neither party makes the application, the

¹ Cornwall vs. Haight, 8 Barb. 327. ³ 3 Denio, 181.

² 6 Barb. 244; 5 Id. 398.

law will appropriate the payments according to the justice and equity of the case. Sureties for the debt are concluded by the same rules, as to the appropriation of payments, which apply to their principal. Where a general payment is made the creditor is allowed a reasonable time to make the application. But if he inform the debtor of the entry, it is an appropriation of the payment to that amount.¹

The giving of a promissory note for a copartnership debt, by one of several partners individually, after the dissolution of the copartnership, under an agreement by the creditor to *accept* it in payment of the debt, extinguishes the liability of the other copartners.²

The acceptance by a creditor from his debtor of a bill or note made by a third person on account of the debt does not satisfy it, unless the parties *agreed* that it should be received in payment, and where the note or bill is received on a precedent debt the presumption is that it was not taken as payment and the *onus* of establishing that it was agreed to be so taken is upon the debtor.

But where it is received contemporaneously with the contracting of the debt, the presumption is that it was agreed to be taken in payment, and the burden of proving the contrary rests on the creditor.³

Receiving the debtor's promissory note for a debt does not merge or extinguish the demand. Nor is a chattel mortgage extinguished by a second mortgage on the same property to secure the debt mentioned in the first. And where the first mortgage was to secure a debt evidenced by a note of the mortgagor, and after default the note was surrendered and a new note given for its amount and some additional indebtedness, and a second mortgage on the same property executed to secure the amount, *held*, that the first mortgage was not extinguished.

The giving of a new note by one of two joint and several makers, intended as a provision for the former note not agreed

¹ 3 Denio, 284; 2 Selden, 147.

³ Noel vs. Murray, 3 Kernan, 167.

² 3 Denio, 410, in the Court of Errors.

to be taken in payment, and not in fact paid, constitutes no defence to an action upon the original note is well settled.¹

The omission to refile a copy of a chattel mortgage, as prescribed by the statute, (Laws of 1833, p. 402, § 3,) does not affect its validity as against a subsequent mortgagee with notice.²

Interest on Money and Accounts.

By the statute *regulating the interest on money* it is provided that the rate of interest upon the loan or forbearance of any money, goods, or things in action shall continue to be seven dollars upon one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time.³

Where no rate of interest is fixed by the contract, the creditor may demand the rate fixed by statute, but the parties may stipulate for any lower rate, and the only way to turn interest into principal, is to settle the balance of interest when it becomes due and add it to the principal by a new agreement.⁴

Merchants and others can by agreement prescribe the mode of charging interest upon the *items* in running accounts between them, provided the mode adopted is not intended to be, and is not in fact, a cover for usury, and in the absence of any agreement the creditor *receiving* a partial payment of a debt has the right of applying it first, to the satisfaction of the interest *then due* before it is applied to the discharge of any part of the principal.⁵

A note for the payment of a particular sum, with interest from a day *anterior* to the date of the note, in itself affords no evidence of usury, and a reservation of interest payable quarterly or half yearly is not usurious.⁶

Interest is not allowable on an unliquidated account for

¹ Bates vs. Rosekrans, 37 N. Y. 409; ³ R. S. 760.

⁵ Denio, 558; 1 Hill, 516.

⁴ Hall, 264; 8 N. H. R. 40.

² Hill vs. Beebe, 3 Kernan, 556; 19 ⁵ 2 Paige, Ch. R. 207.

Wend. 515; 1 Comst. 500; 19 Barb. 459.

⁶ 8 Wend. 533; 8 Cowen, 664; 4 Wend. 652.

goods sold and work done, unless there be an agreement, express or implied, to allow interest.¹

It seems that if the custom of a merchant to charge interest after ninety days is known by those who deal with him, or if the length of credit is *stated* in an account rendered at the sale, an agreement to pay interest may be inferred.²

A merchant or manufacturer whose *uniform* custom it is to charge *interest* after ninety days upon articles sold or manufactured by him, is allowed to charge interest accordingly, to those who are *in the habit of dealing with him*, they being presumed to know such custom and to act in reference thereto.³

Interest is recoverable on cash advances though they are charged in the account between the parties.⁴

Where the agreement was to pay for materials furnished, upon the performance of the contract on the part of the plaintiff, *held*, that the plaintiff was entitled to interest, at least from the commencement of the suit.⁵

If a sheriff retains money after the return day of the execution, he is liable for interest.⁶

Interest is recoverable on money due under a special contract, as where compensation for services is agreed upon, at a specific sum per month.⁷

Although the law does not, in general, give interest upon an open account for goods sold, yet it may be recovered where there was a stipulated term of credit which has expired, or where there is an agreement, express or implied, to pay interest.

And an agreement to pay interest may be inferred from the course of dealing between the parties, as where it has been charged and allowed under like circumstances. So it may be inferred from a uniform practice of the creditor, to charge interest, known to the customer at the time of the dealing. So also where there is a general usage in any par-

¹ 4 Cowen, 496.

² 2 Wend. 501.

³ 4 Wend. 434; Marcy, J.; 8 Wend. 109.

⁴ 3 Cowen. 393; 5 Wend. 587.

⁵ Feeter vs. Heath, 11 Wend. 477; 4 Cow. 602.

⁶ 4 Wend. 675.

⁷ 20 Wend. 51.

ticular trade or branch of business, to charge and allow interest, parties having knowledge of the usage are deemed to contract with reference to it. And if the usage does not conflict with the terms of the contract it will be deemed to enter into and constitute a part of it. Knowledge of the usage may be established by presumptive as well as by direct evidence.¹

Where a debtor is in default for not paying money, delivering property, or rendering services, in pursuance of his contract, he is chargeable with interest from the time of default, on the specified amount of money, or the value of the property or services at the time they should have been paid or rendered. Accordingly in an action of covenant for rent, *held*, that interest was recoverable as matter of law from the time that the rent fell due, although it was payable in wheat, and services, the value of which was unliquidated by the contract.²

Nuisance.

A nuisance is defined to be anything that annoys, incommodes, and offends; anything that renders the enjoyment of life uncomfortable.³

A common nuisance is defined to be one that affects the public, being an annoyance to the whole community in general, as distinguished from a private nuisance, which is confined in its effects to particular individuals.⁴

To constitute a nuisance it is not necessary that the noxious trade or business should endanger the health of the neighborhood. It is sufficient if it produces that which is offensive to the senses and which renders the enjoyment of life uncomfortable.⁵

It seems that whenever any offensive trade becomes an injurious nuisance to any person, such person has a remedy by an action on the case for damages or by writ of nuisance

¹ 3 Comst. 502.

² Id.

³ Burrill's Law Dic. 760; 5 Hill, 121.

⁴ Burrill's Law Dic. 244; 4 Steph. Com. 294.

⁵ Brady vs. Weeks, 3 Barb. 159; 9 Paige, 576; 1 Burr. 337; 8 Black. Com. 217.

to have the nuisance abated, upon the principle that every continuance of a nuisance is a new or fresh nuisance.¹

And whenever the erector of a nuisance owns the premises on which the nuisance stands, and lets the premises to another, an action on the case will lie against him, for the injury the nuisance occasions while the premises are in the occupation of his lessee.² The demise in such case affirms the continuance of the nuisance by the lessor. (*Rosewell vs. Prior*, Ray, 713; 2 Salk. 460; *Cheetham vs. Hamson*, 4 T. R. 320, per Buller, J.; 15 Wend. 526.) The same principle was, in a recent case of *Waggoner vs. Jermaine*, (3 Denio, 310,) held applicable to the creator of a nuisance who conveys the premises to a purchaser with warranty. (*Plumer vs. Harper*, 3 N. Hamp. 88; *Brown vs. The Cayuga & Susquehanna R. R. Co.*, 2 Kernan, 486.)

An action also lies against the lessee or grantee of the erector of the nuisance for the injury occasioned by the continuance of the nuisance by them. (*Brent vs. Hadden*, Cro. Jac. 555; *Rosewell vs. Prior*, Ray, 713; *Penruddock's case*, 5 Coke, 101; *Staple vs. Spring*, 10 Mass. R. 74; *Alexander vs. Kerr*, 2 Rawle, 83; 3 Barb. S. C. R. 161.)

It is a nuisance to deposit dead animals, decayed vegetables, fish, putrid meat, or any other offensive substance in or upon any public street, lane or alley, or above the surface of the ground on any lot, or in any canal or basin within the bounds of a city or village, and the corporation may abate the same. (12 Barb. 559.) Also Boards of Health. (15 Wend. 397.) Such Boards are clothed with large discretionary powers. (15 Wend. 399.) A bowling alley kept for *gain or hire*, is a public nuisance at common law, though gambling be expressly prohibited.³

Among other offensive things that have been declared nuisances, it has been decided that a dwelling house cut up into small apartments, inhabited by a crowd of poor people, in a filthy condition, and calculated to breed disease, is a public nuisance and may be abated.⁴

¹ 3 Barb. 160, and cases cited; ² 3 5 Hill, 121.

Kernan, 486, Denio, J.

⁴ 15 Wend. 397

² 15 Wend. 399.

It was held in the case of *Drake vs. The Hudson River Railroad Co.*, (17 Barb. 508,) that a road passing through the streets in the city of New York, and where the cars are drawn by steam power into a crowded part of the city, (*although not to the terminus of the road,*) was not a nuisance. Similar decisions were made in the cases of *Hamilton vs. The New York & Harlem R. R. Co.* (9 Paige, 171,) *The Lexington & Ohio R. R. Co. vs. Applegate*, (8 Dana, 289,) and *Chapman vs. The Albany & Schenectady R. R. Co.*, (10 Barb. 360 ; 13 Barb. 646 ; 18 Barb. 222.)

Owners of wet lands are not guilty of a public nuisance because they neglect to drain them.¹

Gas works are to be placed in the class of erections which are not within the ordinary and usual purposes to which real estate is applied, and that whenever they create a special injury, they are to be regarded as a *private nuisance*, for which an action will lie in respect to the special injury, like a *swine sty*, (9 Rep. 59,) a lime kiln, (2 Black. 141,) a dye house, (Hutt. 136,) a *tallow chandler*, a *furnace*, (Cro. Car. 570,) a *brew house*, (R. Pal. 139 ; Hutt. 136,) a smelting house, (1 Roll. 89,) a *smith forge*, (Lut. 70,) a *livery stable*, (*Coke vs. Bergen*, 2 Georgia R. 425,) or a tannery,² (17 Barb. 654.)

That which is exclusively a common or public nuisance, cannot lawfully be abated by the private act of individuals. The remedy is *an indictment*, a criminal prosecution, unless some other remedy has been provided by statute.³

A private nuisance may be abated by the party aggrieved. He may remove the nuisance, or he may have his action for private damages sustained by him ; but he cannot have both remedies.

Pews in a Church.

Chancellor Kent, in his valuable Commentaries, vol. 3, p. 402, says, that a freehold right in a pew in a church, may

¹ Woodruff vs. Fisher, 17 Barb. 224. ³ Griffith vs. McCallum, 46 Barb. 561.

² Carhart vs. The Auburn Gas Light Co. 22 Barb. 297, 318.

be classed among incorporeal rights, for the right only extends to the use of the pew, *for the purpose of sitting therein during divine service*. The owners of a pew cannot dig a vault under it, or erect any thing over it, without the consent of the Trustees or owners of the church. It is a right subject to that of the Trustees or owners of the church, who have the right to take it down, or remove the church for the purpose of more convenient worship, without making any compensation to the pew-holders for the temporary interruption, though it has been held that if the church should be taken down unnecessarily, the pew-holder was entitled to be indemnified for the loss of his pew.

Justice Woodworth says, in the case of *Freligh vs. Platt*, (5 Cowen R. 494,) that the sales of a pew in a church is not the sale of real estate within the meaning of the act before mentioned. By the grant of a pew, the grantee acquires a limited usufructuary right only. He may use it as a pew in a house of religious worship, *but has not an unlimited, absolute right*. He cannot use it lawfully for purposes incompatible with its nature. *The right, too, is limited as to time*. If the house be burned or destroyed the right is gone.

Chancellor Walworth held, in the case of the *Baptist Church vs. Witherell*, (2 Paige, 302,) that the grant of a pew *in perpetuity* does not give the owner an absolute right of property, as in a grant of land in fee.

The grantee is only entitled to the use of the pew for the purpose of sitting therein during divine service.

Vice Chancellor McCoun, in the case of *Henry vs. St. Peter's Church*, in New York,¹ says: The right to a pew gives no right to the soil; it gives only a limited estate; hence, in the present case, upon the pulling down and rebuilding, where the lapse of time has made it necessary, the pew-holder's right is gone.

Justice Paige, in the case of *Voorhees vs. the Presbyterian Church*, of Amsterdam, (8 Barb. R. 135, 152,) after citing the foregoing cases with approval, says: The pew-holder has no title to the soil on which the edifice stands, nor to the

edifice itself. The building and soil are the property of the corporation, and the seisin and possession of the same are in the trustees.

Whenever it is necessary or proper, the trustees may take down the old edifice and rebuild on the same spot, or elsewhere, and may alter the form and shape of the building for the purpose of making it more convenient and adapting it to the increased wants of the society. And in doing this they can, for useful purposes, and to carry out the contemplated improvement, take down and remove the pews of the pew-holders. The property of the pew-holders in their pews is necessarily subject to the right of the trustees to alter and improve the internal arrangement of the church, as the good of the society may require. And if, in doing this, the pews are necessarily destroyed, the pew-holders cannot maintain an action against the trustees. The pew-holder has a remedy where his pew is destroyed for convenience only, or where the trustees have been guilty of a *wanton and malicious* abuse of their power in destroying his pew. In such cases, his remedy, *and his only remedy*, is an action to recover damages by way of an indemnity for the loss of his pew. If, however, the church edifice is so far decayed as to be unfit for use, as a house for public worship, and it is for that reason taken down, the pew-holder's right is gone, and he is not entitled to any indemnity for its loss. He also cites 9 John. 147; 3 Edw. Ch. R. 608; 17 Mass. R. 434; 1 Pick. 102; 3 Id. 344; 2 Edw. Ch. R. 138; *Bronson vs. St. Peter's Church*, New York; 7 N. Y. Legal Obs. 361.

It is a general rule, and one that cannot be successfully controverted, that a corporation can only act in the mode prescribed by the law creating it, (2 John. 114; 7 Cow. R. 462; 8 John. 330;) and has no powers, except such as are specifically granted, and those which are necessary to carry into effect the powers expressly granted.¹

Justice Paige, then, says: The deduction from these principles is clear, that the trustees of a religious corporation, incorporated under the General Act, have no power to

¹ 15 John. 382.

make an absolute sale of a pew in perpetuity, without reservation of rent. If the trustees are regarded as the donees of a power, or as invested with a statute authority, they, in either case, are bound to pursue the power or authority in the mode and form of alienation prescribed by the General Act for the incorporation of religious societies. If this is not done in their alienation of the real estate of the corporation the deed will be void.¹

In *Wentworth vs. The First Parish in Canton*, (3 Pick. 344, Mass. Rep.) the court held, on the Common Law, that the plaintiff could not recover.

Parker, C. Justice, says: It has been held in the case of *Daniel vs. Wood*, (1 Pick. 102,) that the property of a pew in a meeting house is a qualified one, subject to the right of a majority of the parish to take down and destroy the house, wholly, or only in part, if necessary, for the purposes for which it was erected, that is, to repair, enlarge, or rebuild the same, where it shall become decayed or useless. It may become so far decayed as to be unfit for use as a place of public worship, and then it may be entirely demolished, and the materials may be worked into a new house, or may be sold, and the proceeds go into the treasury to aid in rebuilding; and, in such case, no individual pew-holder can claim his share of the materials or proceeds thereof, for he did not own them, but only the right of using the pew for the purpose of attending public worship.

It may be asked, what remedy is there for a minority of the pew-holders if the majority shall determine to demolish the building, and thus destroy the pew? We answer none, if the act is necessary and proper.

In the case of *Fasset vs. The First Parish of Boylston*, (19 Pickering, 362,) an action was brought to recover compensation for a pew alleged to have been rendered useless by the acts of the defendants. They had removed a stone wall which supported an embankment at the end of the meeting house, and had used the same for the foundation of a new meeting house. They had built a new house and abandoned the old one.

¹ 1 Hill, 114; 2 Cow. R. 228; 4 Kent's Com. 344, 2d ed.

Wilde, Judge, says: In no case can be found any intimation that a parish or religious society would subject themselves to any liability to the pew-holders in consequence of abandoning their meeting house as a place of public worship, although the pew may thereby be rendered useless. The law is the same, if public worship should be wholly discontinued, either in the meeting house or elsewhere, by reason of the inability of the parish to maintain public worship, &c. It is clear that the pew-holder would have no cause of complaint if the society or parish should abandon their meeting house and wholly cease to occupy it as a place of public worship.

It was decided in the case of the *People vs. Runkel*, (9 John. Rep. 147,) that the trustees of a religious corporation have the possession of the temporalities of the church, whether the same consists of real or personal property, and though they hold it in trust for the church and congregation still it is in their possession.

In the case of the Dutch Church, in Garden street, N. Y. vs. Mott, (7 Paige, 81,) the Chancellor held that the 4th section of the act of March 27, 1801, transferred to the trustees of an incorporated religious society, without any conveyance, the legal title of any real estate or personal property, held in the name of others upon a mere naked trust, for the use of the church; and the 4th section of the act of April 5th, 1813, under which corporations are now formed, is a copy of the 4th section of the act of March, 1801. And see, also, 4 Denio, 442; 10 Paige, 567; which go to sustain the same doctrine.

It was also held in the case of *Greene vs. Cady*, (9 Wend. 414,) that the trustees may maintain an action of trespass against any person for any injuries done to the meeting house of the society.

The powers of religious corporations, incorporated under the General Act, are limited, by that act, to a demise, lease, or improvement of their real estate, and they have no power of sale without the order of the court.¹

¹ 2 Kent's Com. 281, 2d ed.; 7 Paige, 83; 8 Barb. 139, 149.

The words of conveyance, appropriate in a lease, are: demise, lease, and to farm, let, &c., (1 Hilliard, Abr. 130, § 6,) and it may be said, these words are technical words well understood, and are the most proper that can be used in making a lease.¹

A lease is a contract for the possession and profits of lands and tenements on the one side, and a recompense of rent or income on the other, or conveyance of lands, &c., to one for life, for years, or at will, in consideration of rent or other recompense.²

The technical meaning of demise is, a lease for a term of years. The meaning of the words demise and lease as used in the fourth section of the act to provide for the incorporation of religious societies is, very clearly, a lease for years in consideration of rent.³

The deduction from these principles, therefore, is clear, that the trustees of a religious corporation have no power to make any other or different sale of pews in a church, than by a lease for a term therein mentioned, and, in all cases, with a reservation of rent reserved therein.

A grantee of a pew takes a limited estate, a usufructuary interest, subject to the general right of the owners of the church.

If the church edifice becomes useless by dilapidation, or destroyed by fire or casually, or has to be rebuilt, the right of the pew-holder is gone.⁴

Though pews in a church be held under an absolute conveyance, the holders thereof have no legal interest in the church edifice.

A church corporation has power to regulate and order the renting of the pews, but it can no more sell a pew absolutely, without an order of the court for that purpose, than it can sell the house itself without leave. Pew-holders have only the right to occupy their pews for the purposes of worship. The title to the freehold still remains in the corpora-

¹ 2 Bouv. Law. Dic. 18; 8 Barb. 148. ⁴ 3 Paige, 302; 5 Cow. 494; 2 Ed. Ch.

² 1 Hilliard, Abr. 129, § 1; 8 Barb. R. 608; 17 Mass. 435; 17 Barb. 103; 148, and cases cited. 16 Wend. 32; 3 Hill, 26; 10 Mass.

³ 8 Barb. 148.

16.

tion, and the pew-holder cannot compel it to maintain divine service, or even to open the house for that purpose.¹

The owner of a pew in a church is not liable in person in respect to an assessment thereon, unless there be some special ground from which to infer a contract and promise to pay. The interest in a pew, created by a *lease* in perpetuity, is an estate or interest in realty, and the lessees or pew-owners take the title of their pews as real property with all its incidents. Where a lease of a pew is executed to several persons, they are tenants in common of the pew, under their lease, having several distinct freeholds, and each being solely and severally seized of his share. Neither of them can bind the other by an agreement in respect to the common property, but any one can charge his separate and several estate, or can convey it or mortgage it, or become personally liable upon undertaking respecting it.²

Usury.

The statute against usury, (1 R. S. 772, §§ 1 and 2,) prohibiting a greater rate of interest than *seven* per cent "for the loan, or forbearance, of any money, goods or things in action, is applicable only to those loans, which are in substance and effect loans of money."

The statute of Henry VIII., enumerated and prohibited the various devices and expedients, adopted by money lenders to evade the previous laws against usury. The statute of 12 Ann, from which our own is substantially taken, followed the earlier legislation upon this subject, by a partial enumeration of these devices; while the statute, like our own, contains a general prohibition against taking, or securing, more than the legal rate of interest *directly or indirectly* for the loan or forbearance of any money, which rendered such enumeration unnecessary.

The true construction of the two last statutes, as I apprehend, is and has been, that no more than the prescribed rate

¹ Matter of Dutch Reformed Church in Sangerties, 18 Barb. 287, and cases cited by Harris, J. ² St. Paul's Church, Syracuse, vs. Ford, et al. 34 Barb. 16; 16 Wend. 28; 3 Hill, 26; 8 Barb. 180.

of interest should be taken, on a loan or forbearance of money, *directly* or *indirectly*, by way of loan of goods or choses in action, or in any other manner. In a word the statute would have been as comprehensive without the specification of "goods and things in action," as it now is. The terms "interest" and "forbearance," cannot be predicated of any other than a loan of money, actual or presumed. Interest is defined to be a *certain profit* for the use of the loan, and "forbearance" the giving a further day when the time originally limited for the return of the loan has passed. (Ord. 30, 24.) Both imply that the thing loaned has an established value, so that the lender on its return with the compensation fixed by law for the use and risk may receive a *certain profit*. Now this is true only of money, which is legally supposed to have a fixed, unchangeable value in itself, and to be consequently the true measure of the value of all other property.

A fair rate per cent on money, therefore, in contemplation of law is supposed to give to the lender a "certain profit," because the thing loaned is of the same value at the end of the term as at its commencement.

This is not true in part, even of money. And the law does not affirm it to be true of anything else. Accordingly, a loan of goods is not within the statute, whatever may be reserved for their use. (Ord. 26.) Nor a stock of grain to be returned in kind. (Steptoe vs. Harvey, 7 Leigh, 500.) Nor of stock converted into money, by arrangement to be replaced by other stock. (Tate vs. Welling, 3 T. R. 538; 8 East. 304.) Nor of choses in action. (3 T. R. supra.) It is unnecessary to multiply cases. They all proceed upon the doctrine that the value of every thing which can be the subject of a loan, except money, is subject to fluctuation; and, consequently, that an individual who loans five bushels of wheat to receive ten after harvest; or who to sustain the credit of a friend loans him a bond and mortgage for a month, may at the end of the term, from the depreciation of the commodity or security, receive in value less than he parted with, *interest included*. If credit is the subject of loan, as a chose in action, it is not an exception to the general rule

above stated. Its value depends upon opinion and is in all other things, perhaps, the most capricious and fluctuating. But credit is the "capacity of being trusted." It is no more a chose in action, or within the statute, to prevent usury, than a capacity for the fine arts. The statute by "choses in action," refers to a particular species of property, recognized by the law, and which, upon the death of the owner, would be inventoried as such by his legal representatives. Credit may be a benefit to the possessor as a means of procuring property, but is not itself recognized as property by the law. It cannot be loaned, for a loan implies that the thing borrowed is to be returned, after a temporary use, to the owner, in specie or in genere. (Ord. 37.)

Where, however, A., for a consideration paid by B., executes a letter of credit, a promissory note, or a guaranty, and delivers them to the latter to be used for his benefit, neither of them are choses in action in the hands of B., and yet he has received precisely what he contracted for, namely, the privilege of availing himself of A.'s credit with third persons. When the credit is used and a trust obtained, its whole office is fulfilled; it becomes *functus officio*, and in the nature of things can never be returned.

The credit of one person may be rendered available to another by gift or sale, and in no other way. This may be done by a direct contract between the parties, *as an exchange of notes*, (13 Barb. 45,) which is the sale of one promise for another, by an undertaking with third persons directly, or one to be used for the benefit and according to the discretion of the donee or vendee. When the responsibility is incurred gratuitously, it is, in popular language, called a loan, and when for a consideration, a sale of credit. In this sense, a sale of credit is no more within the prohibition against usury than a sale of machinery. According to *Trotter vs. Curtiss*, (19 John. 160,) and in *Suydam vs. West*, (4 Hill, 211,) it was held that a commission of two and one-half per cent for accepting, in addition to interest on the money advanced was not usurious.

So where a bond and mortgage were sold for \$2,600, and the *bond* of the vendor given to the vendee, conditioned that

the mortgagor should pay \$3,000, the amount of the mortgage. (4 Hill, 472.) So the sale of an *indorsement* at three per cent on the amount of a note intended to be and which was discounted at the legal rate, was held valid. (Ketchum vs. Barber, 4 Hill, 225.) And in *More vs. Howland*, (4 Denio, 264,) it was decided that a guaranty was the subject of sale, and the price for it immaterial. The principle of these cases applies to every engagement direct or collateral, assumed in good faith by one man for another, for a stipulated consideration.

The exchange of notes for a premium greater than the legal rate of interest is no exception to the general rule. This was, in effect, determined in *Dunham vs. Day*, (13 John. 40.) In that case Dunham reserved two and one-half per cent on an exchange of notes, which was more than the legal rate of interest. If this was usury *per se* there was nothing for the jury to determine. But it was left to them upon the whole evidence, relating to the situation and conduct of the parties, and they found as a question of *fact* that the exchange was a mere cover for an usurious loan, and the court sustained the verdict. In *Ketchum vs. Barber*, (*Supra*,) the referee found the other way, and the court pronounced the transaction lawful.

It is sometimes asked, why should a man be permitted to receive ten per cent on an exchange of notes when, if he advanced money on the same security, he would get but seven? The answer is, for the same reason that he is permitted to receive twenty dollars for six months' use of furniture valued at one hundred dollars. The one is prohibited, the other not. No man can exchange his promise to pay one hundred and ten dollars at the end of the year for one hundred dollars in cash. 1st. Because he would thereby agree to refund in *kind* precisely what he had received, and this is the definition of a loan, and the ten dollars must, therefore, be a compensation to the lender for the use of the money, whatever name may be given to the transaction. This the statute forbids. The Legislature have fixed the interest of money at seven per cent. This includes a compensation for the use and the risk of its repayment. Nothing more can

be received by or secured to the lender. The consequence is that a promise to pay one hundred and seven dollars in a year is in law an equivalent for one hundred dollars in money presently received, no matter whether the promise is made by a Rothschild or a pauper. This is legally true because the Legislature have so enacted. But they have not declared that a promise to pay money is money or its precise equivalent, in any case except that of a loan. Hence upon an exchange of promises, as in an exchange of property, parties are left to their own judgment as to their relative value.

They are sales, subject to the same rules, and their validity tested in the same manner as other sales. Upon the sale of property on time, the purchase money becomes a debt, which is forborne for the period limited by the credit.

Accordingly, where usury is disguised under a sale of merchandise, the property in the goods passes to the vendee, but the excess of price over the just value is considered as a premium for the forbearance of the debt, founded on a presumed loan of so much of the purchase money as is equivalent to the cash value of the commodity sold. (See cases subsequently cited.)

The same rule applies to the sale or exchange of choses in action, or of credit, when the real object is a loan of money, although no money is received by the borrower. The law, looking at the substance of the transaction, converts the substitute agreed upon by the parties into money, according to its cash value. This amount constitutes the loan to the borrower, and the real debt due from him to the lender. If the securities received by the former are depreciated, the difference between the nominal and money value is so much interest for the forbearance of the debt. If they are equivalent to money, the usury is to be established by showing some direct collateral advantage to the lender, which would avoid a contract upon a loan of money.

In a word, neither sales of credit, nor loans, or sales of property, other than money, are touched by the statute. It is not enough that the vendee wants money, and that this is known to the opposite party. Neither the necessities of the

vendee, nor the use he contemplates making of his purchase, will deprive the vendee of his right to determine for himself the terms upon which he will part with his property. (1 Bro. Ch. cases.)

His conduct may be oppressive, but all extortion is not usury. Nor can a penal statute, designed to correct a particular evil, be made a remedy for the violation of all duties of imperfect obligation.

It follows, that in every instance where the contract in form is one of sale or exchange, (*and the principle applies to loans of chattels,*) if the court, in looking at the whole transaction, can see that the value secured to the vendor was in good faith, but the price of the thing sold or exchanged by him, there can be no usury, whatever the price may be, or the mode in which it may be reserved. (*Beebe vs. Bloodgood*, 4 B. & Cresswell, 453; *Van Schaack vs. Edward*, 2 John. cases 356; 9 Peters, 378; 1 Hill, 227; 3 Edw. 146; 1 B. & Pull. 151.) *Where, however, the object of the parties is a loan of money, and something else under the form of an exchange or sale is substituted for it,* the principle of the loan, and consequently of the debt contracted by the nominal vendee, will be the value in money of the substitute received by him; and any consideration paid or secured to the vendor beyond that will, in general, be considered as interest for its forbearance.¹

A purchaser of land, encumbered by an usurious mortgage, may set up the usury in defence to a bill of foreclosure, unless, by the terms of the purchase, he took the equity of redemption merely, subject to the payment of the mortgage.²

Where a borrower, on obtaining a loan of money at an illegal rate of interest, assigns to the lender bonds and other securities, in consideration of such loan, the *assignment is void*, and trover may be immediately maintained for them by the vendor.³

¹ 1 Bro. Ch. C. 150; *Low vs. Waller*, Dougl. 786; 2 Camp. N. P. 375; Holt's N. P. C. 295; Comyn on Usury, 94, 95; See 3 Comst. 344, and cases cited, Gardiner, J.; 4
² *Brooks vs. Avery*, 4 Comst. 225, cases cited; *Post vs. Dart*, 8 Paige, 639; *Shufelt vs. Shufelt*, 9 Paige, 137.
³ 2 Selden, 107. Comst. 114.

There can be no usury in a loan of chattels, whatever may be the per centage upon their value agreed to be paid for their use, unless such loan is intended as an indirect loan to money.¹

It is well settled, that, upon the discounting of commercial paper not having a longer time to run to maturity than the notes and bills which are usually discounted by bankers, interest on the whole amount of principal agreed to be paid at maturity, not exceeding the legal rate, may be taken in advance.²

The question was raised in the case of *The Utica Insurance Co. vs. Bloodgood*, (4 Wend. 652,) whether a person not having banking powers could discount commercial paper, and was decided that he could do so by taking *interest in advance*.

To constitute a *usurious contract* there must be, 1st. A loan; and 2d. An agreement to pay illegal interest. And it is essential to the nature of a loan that the thing borrowed is at all events to be returned. When the principal is *bona fide* put in hazard, it is no loan, and it is no usury to take more than legal interest.

It is also essential to the nature of usury that a certain gain, exceeding the legal rate of interest, is to accrue to the lender as a consideration for the loan. If the gain to the lender, beyond the legal rate of interest, is made dependent on the will of the borrower, as where he may discharge himself from it by the punctual payment of the principal, the contract is not usurious.³

An agreement made by a borrower *with the agent* of the lender, that the agent shall have a commission for making the loan, does not render the transaction usurious and the security void, if made without the knowledge of the lender, and it is in no respect for his benefit or advantage. In such a case, the agreement will be held to be that of the agent and the borrower only, or the private extortion of the agent, and he

¹ *Bull vs. Rice*, 1 Selden, 815.

³ 22 Barb. 118.

² *Marvine vs Hymers*, 3 Kernan, 223; 15 John. 162; 2 Cowen, 664;

3 Wend. 408.

alone is answerable. The agent of the lender, whether his principal agrees to it or not, may lawfully take compensation from the borrower, for any services actually rendered for the latter at his request.¹

A note delivered by the maker, without consideration therefor, to a third person, to enable the latter to raise money thereon, for the maker or himself, has no legal inception in his hands. If he negotiate the note upon an usurious consideration it is void.²

The taking of usury, or including it in new notes, by way of renewal of other valid notes free from such taint, does not prevent a recovery of the sum actually due upon the valid notes, although the original notes were surrendered when the new notes were given.³

Where the plaintiff purchased an outstanding mortgage against the defendant, and paid for the same, a usurious contract to make further advances on said mortgage does not extend to vitiating the mortgage for any part of the money due thereon at the time of the assignment thereof to the plaintiff, but only to so much as might have been advanced under the usurious agreement. The plaintiff's title to the mortgage is perfect under the assignment.⁴

Agent and His Authority.

An agent is one employed by any person competent to do any act for himself, to do it for him. The employer is called the *principal*, and the employment an *agency*. Any person who is not actually disabled by weakness of mind, or want of understanding, may be an agent. What would constitute a legal disability to contract for himself, will not incapacitate him from becoming an agent. Thus, infants, slaves, or married women may act as agents.⁵

The authority of an agent may be conferred verbally, and it may be implied from the acts of the parties.

A *general agency* is an authority to do all acts connected

¹ Condit vs. Baldwin, 21 Barb. 181, Johnson, J. ³ Winsted Bank vs. Webb, 39 N. Y. 325.

² Catlin vs. Gunter, 1 Kernan, 368, Johnson, J. ⁴ Kellogg vs. Adams, 39 N. Y. 28.
⁵ 4 Term, 177; 6 Hill, 336.

with a particular business or transaction. The principal is bound by all the acts of his general agent which are ostensibly within the scope of his authority, notwithstanding they may be in violation of his private instructions.¹

Whenever an authority is conferred upon an agent, whether express or implied, it is construed to include all the necessary or usual modes of so executing it as to accomplish the object of the agency ; as where I authorize my servant to sell my horse, his representations at the time of the sale, as to his soundness, will bind me ; so where an agent is employed to procure the discounting of a note or bill, he may, if necessary, endorse it in the name of his principal.²

The representations, admissions, and concealments of an agent, *made at the time*, and constituting a part of the transaction and being inducements to the contract, are binding upon the principal, though if made at another time, and without forming part of the transaction, they are not.³

An agent cannot delegate his authority to another, for it is a maxim of law that delegated power cannot be transferred by the delegate. He must transact the business entrusted to him, in the name of his principal, or the contract will not bind the principal and will become binding upon himself. So, where "A., attorney of B.," contracts to convey the land of B., the contract is not binding upon B.

A *factor* is an agent or broker employed to sell goods or negotiate bills upon commission for his principal. His general duty is to pursue strictly the directions of his principal, unless absolute necessity, or, in some instances, a pressing emergency requires him to deviate from them. Thus, a factor directed not to sell his principal's goods at less than a particular price, if he finds them perishable, and an immediate sale is necessary to prevent a greater loss, may dispose of them at a less price.⁴

Where a quantity of butter was put into the hands of an agent, who was proceeding to the city of New York to sell,

¹ Story on Agency, § 126.

² Story on Agency, § 135; 13 Wend.
518.

³ Story on Agency, § 135; 13 Wend.
518.

⁴ 2 Cai. 310; Story on Cont. §§ 141,
142.

with directions *to do the best he could with it ; to do as well with it as if it was his own* ; and the agent, after endeavoring in vain to dispose of it in New York at a fair price, sent it, *together with his own*, to a southern market, it was held that the question whether this was or was not an excess of the agent's authority was a question for the jury to decide, upon evidence as to the usual course of business in relation to such matters. Ordinarily, an action of trover will not lie by a principal against his agent, unless it appear that the agent has converted the property of his principal to his own use, or disposed of it contrary to his instructions ; there must be some *act* of the agent ; a mere *omission of duty* is not enough, though the property be lost in consequence of the neglect. Nor will trover lie where the agent, though wanting in good faith, has acted within the general scope of his powers.¹

The principle is, that when a trust is confided to an agent, and he whose interest is intrusted is damnified by the neglect of one whom the agent employs in the discharge of the trust, the agent employed shall answer to the person damnified.²

The rule, it is believed, is universal, that a known agent is not responsible to third persons for acts done by him, in pursuance of an authority rightfully conferred upon him. The very notion of an agency proceeds upon the supposition that what a man may lawfully do by a substitute, when performed, is done by himself, and the individuality of the agent so far is merged in that of the principal. It is also settled, if anything can be established by authority, that an agent is not liable to third persons for an omission or neglect of duty in the matter of his agency, but that the principal is alone responsible.³

A subsequent ratification, by a principal, of the unauthorized act of a person professing to act as his agent, in order

¹ 21 Wend. 616.

² 3 Selden, 461, Jewett, J.; 20 Wend. 321; 22 Id. 515; 2 Denio, 115; 20 John. 372; 3 Cowen, 663; 5 Denio, 639; 2 Comst. 126.

³ 2 Comst. 126; 2 Denio, 118, and cases cited.

to be valid, must be made with a full knowledge of the facts affecting his rights.¹

Where the mortgagor of chattels in possession thereof, after default in the payment of the mortgage debt, fraudulently delivered them to a third person for sale, representing that they were his property, and the third person as agent for the mortgagor sells the chattels, such third person is liable to the mortgagee for the value thereof, notwithstanding he acted in good faith, believing that the chattels were the property of the mortgagor, and paid the proceeds of the sale, which he made to the mortgagor, without reward for his services.²

The agent in a fraudulent disposition of the property of another, not being money or negotiable paper, is liable therefor to the owner, although he acts in good faith, without interest or reward, and in the belief that his principal is the owner.

Submitting Cause to the Jury.

After the evidence is closed on both sides, and before the cause is submitted to the jury by the parties, it frequently becomes a question, whether either party may call further testimony in the cause. After the cause is finally submitted either to the Justice or jury, it is then clearly too late. At any time before this, or at any time before the counsel on both sides have closed their arguments, it is discretionary with the Justice, either to admit or reject such further testimony; and if such discretion be exercised properly, either in receiving or refusing it, the judgment will not for that reason be reversed. It can never be claimed by either party at the trial, as a matter of strict right, to open the cause to proof, after full opportunity has been given to each side to be heard, and the testimony has been regularly and by mutual consent closed. The subsequent admission of testimony

¹ *Nixon vs. Palmer*, 4 Selden, 398, ² *Spraight vs. Dudley*, 89 N. Y. 441.
Mason, J.; Dunlap, Paley on
agency, 171, note o; Story on
agency, § 324, 243; 9 Peters, 608.

must rest in the discretion of the court, duly exercised according to the circumstances of the case.

After the evidence is closed, the defendant has the privilege of moving for a nonsuit, if he desires to do so, and get the decision of the court upon his motion.

If the Justice is of opinion that the action is not *sustained*, he is authorized to grant a nonsuit, although a jury is empannelled to try the cause, or if he is of opinion the proof on the part of the plaintiff is *defective* and a nonsuit should be granted, unless the defect is supplied by other evidence, *he should*, in that case, give the plaintiff an opportunity to supply the defect by evidence, *if he desires to do so*, and thus make out his case.

So it sometimes happens the defendant desires to raise the same question to the court upon the whole evidence on both sides, which he may do at the close of the evidence and before the cause is finally submitted to the court or jury for their decision, and in the same manner as before stated.

If no such motion is made, the defendant or the party holding the negative, first sums up the cause to the court or jury, and the other party follows and closes the summing up. And if the trial be by jury, the Justice may, if he think proper, charge the jury by a recapitulation of the facts proved and their different bearings upon the case, and he may also charge them upon the law of the case, but should he charge wrong, the judgment would be *reversed for that error*.¹

He may, however, decline to charge them at all, and should he do so, *it is no error* of which either party could take advantage.

After hearing the proofs and allegations of the parties as before stated, the jury must be kept together in some convenient place, under the charge of a constable, duly sworn for that purpose, until they agree upon their verdict, and for that purpose the Justice must administer to the constable the following oath :

¹ 6 Hill, 326; 18 Barb. 82.

Form of Oath to Constable.

"You swear, in the presence of Almighty God, that you will, to the utmost of your ability, keep the persons sworn as jurors on this trial together, in some private and convenient place, without meat or drink, except such as shall be ordered by me; that you will not suffer any communication, orally or otherwise, to be made to them; that you will not communicate with them yourself, orally or otherwise, unless by my order, or to ask them whether they have agreed on their verdict, until they shall be discharged; and, that you will not, before they render their verdict, communicate to any person the state of their deliberations, or the verdict they have agreed on."

No person but a constable can be sworn to attend the jury. But if the jury make up their verdict without retiring from the court, a constable need not be sworn. And, if the parties so agree, the jury may retire without a constable.¹

In suits before Justices of the Peace, the jury must always be put in charge of a constable sworn to attend them, unless they find a verdict on the spot without leaving their seats. And this whether the jury retire from the court or the court leaves them alone in the court room.²

After the jury have retired the Justice ought not to confer with them, unless done with the consent of the parties; the practice is dangerous and improper. And it makes no difference, although the Justice refuse to answer questions put to him by the jury.³

When the jurors after retiring, separate, so as to raise the slightest suspicion of abuse, the verdict will be set aside. When, after a cause was committed to a jury, one of the jurors separated himself from the constable, and drank a third of a gill of brandy, the Supreme Court set the verdict aside.

Where jurors, during the trial of a civil cause, were allowed to separate, and one of them drank spirituous liquors, *held*, not a ground for setting aside the verdict, it

¹ 2 Caines, 221; 8 John. 437; 11 John. 239; 13 John. 487; 1 John. 134.

³ 10 John. 239; 13 John. 487; 1 Cow. 258.

² 14 Barb. 381.

not appearing that in doing so he violated any express direction of the court, and there being no reason to suppose that he drank to excess, or upon the invitation of either party. (*The case in 7 Cowen, 262, overruled on that point.*) Cases relating to misconduct of jurors in civil and criminal trials, cited and reviewed.¹

When the jurors agree, each to mark down the sum he thinks proper, and to divide the total amount by the number of jurors, their verdict so found will be irregular. A verdict of *no cause of action*, and a verdict of six cents damages and six cents for defendant, in a case where no set-off is pleaded, are to be regarded as general verdicts for defendant. A verdict for more damages than the party claims is mere error in form for which a judgment will not be reversed.²

When the jury is empannelled before Sunday commences, they may bring in their verdict on Sunday. No court can be opened, or transact any civil business on Sunday, except receiving a verdict or discharging a jury. § 7, Title 1, Chap. 3, of Part 3, R. S.³

When a Justice is satisfied that the jury cannot agree, after they have been out a reasonable time, he may discharge them, and issue a new venire, returnable in forty-eight hours; unless the parties agree that the Justice may decide the cause on the evidence already before him, which, in such case, he may do.⁴

The provision of the statute prescribing the time within which a venire for a *second jury*, upon a discharge by a Justice of the first, for their failure to agree, shall be made returnable, (2 R. S. 245, § 111,) was designed for the convenience of the parties, and compliance with it may be waived by their consenting that the process be returnable at a later period. (*Embury vs. Conner, 3 Comst. R. 511, and cases there cited.*)⁵

¹ 5 Cow. 283; 7 Cow. 262; *Wilson vs.* 3 15 John. 119.

Abrahams, 1 Hill R. 207.

⁴ 2 R. S. 245, § 111.

² 16 John. 178; 1 Cowen, 237; 2 R. 5 20 Barb. 275.

S. 175, § 120; 2 John. 181; 3 John.

427; 3 John, 433.

After a cause tried in a Justices court has been submitted to the jury, and they have retired to consider of their verdict, it is not *irregular* in the Justice, at the request of the jury, to give them further instructions upon the law of the case, if the *parties* are, or have an opportunity of being present.¹

When the jury return into court, the Justice should call over their names, and if they all appear, the plaintiff should then be called;² and if the plaintiff or some one for him should not appear, the Justice cannot receive the verdict, but must give judgment of non-suit against him.³ But where the return of a Justice was silent as to whether the plaintiff was called or present when the verdict in his favor was rendered, the court of review refused for this cause to reverse the judgment.⁴ If the plaintiff appear, the Justice should say, *Gentlemen, have you agreed on your verdict?* To which the foreman answers in the *affirmative*. The Justice should then say, *Who do you find for?* To which the foreman answers, *We find for the plaintiff or defendant, (so much.)*

The jury may, at any time before the verdict is recorded, correct either in form or substance. They may do this of themselves, or on the suggestion and advice of the Justice. They may do it immediately on discovering or being apprised of a mistake, or may retire a second time and make the correction, on more mature deliberation, at their room. They may also alter their verdict after having sealed it up and delivered it if they desire so to do, and for that purpose may retire to their room again.⁵

The Verdict.

The statute contains the following provision relative to the receiving and entering the verdict:

When the jurors have agreed on the verdict, they shall deliver the same to the Justice, publicly, who shall enter it in his docket.⁶ The jury may, at any time before their ver-

¹ 18 Wend. 274; 22 Wend. 869.

⁴ 3 Hill, 75.

² 2 R. S. 244, § 110; [4th ed. p. 448.]

⁵ 6 John. 68; 7 John. 82.

³ Id. 246, § 119; [4th ed. p. 444;] ¹⁴ 6 2 R. S. 2d ed. p. 175, § 110.

Barb. 881; 8 Denio, 77.

dict is recorded, correct it, either in form or substance. They may do this of themselves, or on the suggestion and advice of the Justice. They may do it immediately on discovering or being apprised of the mistake, or may retire a second time, and make the correction, on more mature deliberation, at their room. To determine whether the jury are unanimous, (as they must be in their verdict,) either party has a right to have the jury polled, (unless he have expressly assented to waive the right,) in which case the Justice must call them over one by one, and ask if the verdict pronounced be their's thus: "*Is this your verdict?*" If it turn out that any one of the jurors disagree with his fellows, it is no verdict, and the jury may be sent out again. If they are not polled, and the Justice think the verdict palpably incorrect, he may himself send the jury back to reconsider it. And in one case, where they were thus sent back by the Justice, and altered a verdict, which was for the defendant, into a verdict of twenty-four dollars for the plaintiff, it was held well, and the judgment affirmed.¹ The jury may disagree to a verdict which they have written and sealed up, and may be polled in relation to such a verdict as well as any other;² and it makes no difference in this respect that the parties agreed that they might seal up their verdict, and deliver the same in this form;³ for a verdict is not final, until pronounced and recorded in open court.⁴

The Judgment.

A final judgment at once puts an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover in the action.⁵

It will be perceived, that in all cases of a final judgment, rendered by a Justice of the Peace, it is peremptory, and collectable of the proper goods and chattels of the party against whom it is recovered, and in many cases the execution may be issued upon it against the body. It is provided

1 7 John. 32, and vid. Pennington on 3 6 Id. 68.

Small Causes, 178; 6 John. 68; 3 4 Id.; 7 Id. 32.

Id. 255; 2 Wend. 352, 619.

5 3 Black. Com. 396, 7.

2 3 John. 255.

by statute that whenever a set-off is established in a suit brought by executors or administrators, the judgment shall be against them in their representative capacity, and shall be evidence of a debt established, to be paid in the course of administration; but execution shall not issue thereon, until directed by the surrogate, who granted letters testamentary or of administration.¹

In cases where the plaintiff is nonsuited, discontinues, or withdraws his action, and where judgment shall be confessed, and in all cases where a verdict is rendered, or the defendant is in custody at the time of hearing the cause, the Justice must forthwith render judgment, and enter the same in his docket. In all other cases he must render judgment, and enter the same in his docket, within four days after the cause shall have been submitted to him for his final decision.² And in no case can a Justice amend his judgment after he has entered and declared it, though he have committed a clerical error in the computation of the amount.³ The four days in which a Justice shall render judgment are to be computed according to the rules heretofore laid down, excluding the day of trial; and if the fourth day thereafter is Sunday, judgment must be rendered the day preceding.⁴

In relation to the foregoing section of the statute, the Supreme Court have made the following decisions, to wit:

It is the duty of a Justice to render judgment, and enter the same in his *docket*, within four days after the cause is submitted to him for a final decision. A judgment rendered after four days is erroneous, and will be reversed.⁵

Though if a suit be tried on its merits before a Justice, and submitted for his decision, yet if he *omit* to render judgment therein, the proceeding will form no bar to a second action for the same cause. His neglect to render judgment within the *four* judicial days, works a discontinuance.⁶

The limitation of time in the statute, directing that Jus-

¹ 2 R. S. 236, § 56, [4th ed. p. 486.] ⁴ 7 Cowen, 147.

² Id. 247, § 124, [4th ed. p. 445;] 10

Wend. 519; 19 Id. 371.

⁵ Watson vs. Davis, 19 Wend. 371.

⁶ 5 Hill, 60, Nelson, Ch. J.

³ 18 Wend. 558.

tices of the Peace shall render judgment, and enter the same in their dockets, within four days after the submission of the cause, was intended for the convenience of the parties and the protection of their rights, and a compliance with the statute may be waived by them. When any act is deferred beyond the time limited by the Justices' Act, by the consent of the parties, it is no error that the act is done after the time specified in the act, if done within the agreed time. Where parties submit their cause to the Justice, and stipulate with each other that the Justice may take *five* days instead of four to render judgment, it seems they will be *estopped* from ever alleging in a Court of Justice, as ground of error, that the judgment was rendered on the fifth instead of the fourth day.¹

Where a Justice of the Peace, after a jury had pronounced their verdict, rendered judgment immediately, and noted it in his minutes of the trial, but omitted to enter it upon his docket until *two or three* days after, *Held*, that the omission was not cause for reversal.²

Where a Justice of the Peace decided a cause before him, and made upon the papers in the suit a memorandum of his judgment within four days after the final submission to him, *Held*, that the judgment was regular and valid, although no entry thereof was made in his docket until after the lapse of four days.³

A Justice of the Peace must enter judgment upon the verdict of a jury, immediately upon its being rendered, and if he omit to do so until the next day no judgment can be rendered by him.⁴

The case of *Watson vs. Davis*, (19 Wend. 371,) commented on and explained.⁵

Merely entering the verdict of the jury in his docket by the Justice, and putting down the items of costs and adding them up, with the verdict, and thus ascertaining the sum total, without doing anything further, is not rendering a

¹ *Barnes vs. Badger*, 41 Barb. 98; 20 Barb. 275. ⁴ *Sixby vs. Howard*, 3 Denio, 72, Bronson, Ch. J.; 2 Denio, 26, Bronson, Ch. J.; 6 Hill, 38.

² *Hall vs. Tuttle*, 6 Hill, 38.

³ *Walrad vs. Shuler*, 2 Comst. 134. ⁵ *Id.*

judgment on such verdict. Judgment must be rendered and entered in some way as a judicial act.¹

The statute provides that, in all cases where a verdict shall be rendered in a Justices Court, the Justice shall forthwith render judgment, and enter the same in his docket. (2 R. S. 247, § 124.) The decision must be evidenced by some official act. A decision in the mind of the Justice, unless it is entered in the docket or in the minutes of the trial, is of no avail whatever. It is not a legal rendering of judgment, and will not constitute a judgment in law.

When a balance shall be found in favor of the party, either by the verdict of a jury or upon hearing before a Justice, exceeding the sum for which the Justice is authorized to give judgment, such party may remit and release the excess, and may take judgment for the residue.²

The plaintiff in a Justices' Court may, upon the coming in of a verdict in his favor for more than twenty-five dollars, remit the excess beyond that amount, or any other sum, and a judgment for the residue will not be erroneous.³

Judgment of Discontinuance.

Judgment of discontinuance, which is a mere suspension of the proceedings without affecting the merits of the action, is rendered in several cases specified by statute, as where a Justice is a material witness;⁴ or where the defendant's set-off exceeds the plaintiff's claim by more than fifty dollars, and he does not require it to be set-off;⁵ or where it appears on the trial of a cause that the total amount of the plaintiff's demand and the defendant's set-off exceeds four hundred dollars;⁶ or where a question of title to land arises from the plaintiff's own showing.⁷ In all these instances, except the first, the judgment is for the defendant

¹ Stephens vs. Santee, 51 Barb. 532, and cases cited ⁴ 2 R. S. 246, § 118; [4th ed. p. 444.]

² 2 R. S. 177, § 125. ⁵ 2 R. S. 236, § 53, [4th ed. p. 436.]

³ Clark vs. Denure, 3 Denio, 319, ⁶ Id. § 54, [4th ed. p. 444.]

Jewett, J.; 12 John. 435; 4 Hill, 76. ⁷ Id. § 63.

with costs. There are other cases where the proceedings are discontinued, but where no judgment is rendered against either party for damages or costs, as where the defendant interposes a plea or title; or the Justice, after the issuing of process, discovers his relationship to one of the parties; or where he is absent on the day of the trial; and other instances which have been noticed under their several heads. Where the proper affidavit is made, showing that the Justice is a material witness, and that the facts the party relies on cannot be proved by any other witness, the suit must be discontinued. The Justice has no discretion.¹

Judgment of Nonsuit.

Judgment of nonsuit with costs shall be rendered against a plaintiff prosecuting a suit before a Justice of the Peace in the following cases:²

1. If he discontinue or withdraw his action.
2. If he fail to appear, on the return of any process, within one hour after the same was returnable.
3. If, after an adjournment, he fail to appear within one hour after the time to which the adjournment shall have been made.
4. If he become nonsuited on the trial.
5. If he shall not appear on the coming in of the jury to hear their verdict.

On the return of a jury in a Justices' Court to deliver their verdict, the Justice must see that the plaintiff, or *some person* authorized by him, appear before he receives the verdict. Where, on the return of the jury, the Justice called the plaintiff, *and some person not known to him answered*, upon which he received the verdict and rendered judgment, *held erroneous*.³

The Justice's return must show affirmatively that the plaintiff appeared when the verdict was given.

Judgment for the defendant, with costs, shall be rendered whenever a trial has been had and it be found by verdict, or

¹ 24 Wend. 264.

³ Shove vs. Raynor, 3 Denio, 77.

² 2 R. S. 176, [2d ed. § 119.]

by the decision of the Justice, that the plaintiff has no cause of action against the defendant.¹

After the testimony of a plaintiff on a trial is closed, the Justice may nonsuit the plaintiff, if, in his opinion, the testimony offered does not support the action.²

A nonsuit may be granted at the trial of a cause, on the testimony adduced by the defendant. But after the cause has been submitted to the jury, the Justice has no right to take the cause from the jury, and nonsuit the plaintiff.³

Judgment by Confession.

A Justice of the Peace may enter a judgment by confession of the defendant, where the amount confessed shall not exceed five hundred dollars, in the manner prescribed by article eight, title four, chapter two, of part three of the Revised Statutes.⁴

No confession shall be taken, or judgment rendered thereon, unless the following requisites be complied with :⁵

1. *The defendant must personally appear before the Justice.*

2. The confession shall be in writing, signed by the defendant, and filed with the Justice.

3. If the judgment be confessed for a sum exceeding fifty dollars, the confession shall be accompanied by the affidavit of the defendant and plaintiff, stating that such defendant is honestly and justly indebted to the plaintiff in the sum named in such affidavit, over and above all just demands which he has against him, and that such confession is not made or taken with a view to defraud any creditor.

The omission to annex an affidavit to a confession of judgment in a Justices' Court, as required by the statute, renders the judgment void as to creditors only. It is valid and binding upon the defendant notwithstanding such omission.⁶

¹ 2 R. S. 176, § 120.

² 11 John. 299.

³ 8 Hill, 287; 23 Wend. 480; 8 John. 430; 2 R. S. 176, § 121.

⁴ Code, § 53.

⁵ 2 R. S. 175, § 114; 9 Wend. 569, § 115.

⁶ Stone vs. Williams, 40 Barb. 322.

A Justice of the Peace has the same authority to receive a confession of judgment at the defendant's house in the town of the Justices' residence as he has to receive it at his own house. And if the defendant appears before the Justice at the former place and signs the confession in his presence, the presence or absence of the Justice's docket, at that time and place, will not affect the jurisdiction of the Justice.¹

Every judgment confessed without a compliance with the provisions of the last preceding section, shall be void as against all persons, except a purchaser in good faith of any goods or chattels, lands or tenements, under such judgment and except the defendant making such confession.²

It is regular for a creditor having a demand exceeding fifty dollars, to take from his debtor several confessions, each for a sum less than fifty dollars to the full amount of his claim, and thus avoid the necessity of making the affidavit required by statute.³

The confession should state whether the damages confessed arose upon contract or upon tort, in order that the Justice may know whether the execution to be issued on the judgment should contain a clause authorizing an arrest of defendant.

As every confession must be in writing, one form will serve as a precedent in all cases.

Form of Confession of Judgment.

"IN JUSTICES' COURT.—Before Justice of the Peace.
Stephen Stow }
 vs. }
Alfred Roe. }

I hereby confess judgment in this cause, at the suit of the above named plaintiff, for dollars and cents, damages, (*for the amount of a promissory note, or for taking personal property as the case may be,*) this 10th day of

1 4 Cow. 385; 23 Barb. 313.
2 9 Wend. 569

3 Cornell vs. Cook, 7 Cowen R. 310.

, 18 , and consent that the said Justice enter judgment against me accordingly. ALFRED ROE."

As the affidavit must expressly refer to the confession, the most explicit and convenient mode of making the affidavit will be to subjoin or annex it to the confession.

Form of Affidavit.

"TOWN OF —, ss. We, Alfred Roe and Stephen Stow, the parties named in the foregoing [or annexed] confession of judgment, being both duly sworn, do severally depose and say, that said Alfred Roe is honestly and justly indebted to the said Stephen Stow in the sum of sixty dollars, [on contract, or as the case may be,] over and above all just demands which the said Alfred Roe has against the said Stephen Stow ; and that the said confession of judgment is not made or taken with a view to defraud any creditor.

ALFRED ROE,
STEPHEN STOW.

Subscribed and sworn }
18 , before me, }
Justice."

In all judgments or decrees, rendered by any court of justice, for any debt, damages, or costs, and in all executions issued thereon, the amount shall be computed, as near as may be, in dollars and cents, rejecting lesser fractions ; and no judgment or other proceeding shall be considered erroneous for such omissions.

Judgment obtained by a Domestic.

At the recent session of the Legislature, the following statute was passed, for the benefit of those who are employed in families as "domestics :"

CHAPTER 303.—An Act to modify the Exemption Laws on judgments rendered for a claim accruing for work and labor performed in a family as domestic.

Passed April 7, 1857.

The People of the State of New York, represented in Senate and Assembly, do enact as follows :

SECTION 1. No property shall be exempt from levy and sale by virtue of an execution, issued on a judgment rendered in any court in this State, for a demand accruing for work and labor performed in a family as a domestic, to an amount not exceeding fifty dollars.

The word "*domestic*," as used in this statute, is doubtless to be understood as referring to that class of laborers who are employed *in the household*, and doing the ordinary work of the family.

It clearly refers to work and labor, (*as the title of the act expresses it*,) performed *in the family*, as a domestic, and not to a class of domestics who may be employed at various kinds of labor on or about the farm, upon which the family may reside.

This statute was passed evidently to remedy an evil prevailing in our cities and large villages, where a large class of domestics are employed in families, who ostensibly appear in affluent circumstances, but when called upon for pay, have nothing to pay with, but empty flour and pork barrels, and a few yards of silk, mull and muslin, that hang about their backs, for which, perhaps, they are indebted to the merchant, and the poor laborer is turned away without pay, and frequently in a suffering condition.

Whenever an action is brought to recover pay for labor performed in a family as a domestic, the plaintiff should be careful and not put in the complaint any other cause of action, as the judgment must be for *labor* alone, performed in this way.

The proper course will be for the Justice issuing the execution to recite the fact in it, that the judgment was rendered for work and labor performed in the family of the defendant, as a domestic, which can always be inserted immediately after stating the amount, and striking out the words "*except such goods and chattels as are by law exempted*," and then the constable will be authorized to take any and all of the personal property of the defendant, even to his last bed, or any household furniture, or other property he may own.

It, undoubtedly, would be the most prudent course for

the plaintiff to state in her complaint, before the Justice, the true cause of action, as follows :

"IN JUSTICES' COURT.—Before , Justice.

Ann Jones)
 v.)
 David Roe.)

The plaintiff complains of defendant, and says that the said defendant is indebted to her in the sum of \$15, for ten weeks' labor, performed for the defendant in his family, as a domestic, at twelve shillings per week, commencing about the 10th February, and ending about 16th April, 18 . The plaintiff, therefore, demands judgment for \$15, besides her costs.

"July 8, 18 ."

Transcripts of Judgments.

§ 63. A Justice of the Peace, on the demand of a party in whose favor he shall have rendered a judgment, shall give a transcript thereof, which may be filed and docketed in the office of the clerk of the county where the judgment was rendered. The time of the receipt of the transcript by the clerk shall be noted thereon, and entered in the docket; and, from that time, the judgment shall be a judgment of the county court. A certified transcript of such judgment may be filed and docketed in the clerk's office of any other county, and with the like effect, in every respect, as in the county where the judgment was rendered; except that it shall be a lien, only from the time of filing and docketing the transcript. But no such judgment for a less sum than twenty-five dollars, exclusive of costs, hereafter docketed, shall be a lien upon, or enforced against real property.

If the judgment be docketed with the county clerk, the execution shall be issued by him to the sheriff of the county, and have the same effect, and be executed in the same manner as other executions and judgments of the county court, except as provided in section sixty-three.¹

¹ Code, § 58, sub. 18.

When judgment shall have been rendered in a court of Justice of the Peace, or in a Justice's or other inferior court in a city, and docketed in the office of the clerk of the county, the application for leave to issue execution must be to the County Court of the county where the judgment was rendered; or in the city and county of New York, to the Court of Common Pleas of that city and county.¹

Filing a transcript of, and docketing a judgment rendered by a Justice of the Peace, in the county clerk's office, pursuant to the Revised Statutes, (2 R. S. 247, § 128,) rendered it a lien on real estate, co-extensive in time with judgments recovered in the Court of Common Pleas.

The Statute of Limitations, (2 R. S. 295, § 18,) which barred an action on such judgment after six years, did not extinguish it or destroy its lien, when it had been docketed.

Accordingly, where a transcript of a judgment, recovered before a Justice on the 25th of July, 1837, was filed and the same docketed in the county clerk's office on the 27th day of the same month, and an execution was issued by the clerk, and delivered to the sheriff on the 10th of July, 1843, who, in July, 1844, sold thereon real estate, and afterwards executed a deed to the purchaser, *Held*, that he acquired thereby the title of the judgment debtor.^{2*}

The following form will give the Justice some idea of the manner in which his docket should be kept:

Form of Transcript.

"IN JUSTICES' COURT.

Stephen Stow }
 vs. }
 Alfred Roe. }

June 1st, 18 , summons issued, returnable the 10th inst., at 2 P. M., at my office. Returned, personally served, 2d June, by W. W. Long, const., fees cts.³

¹ See Code, § 284.

³ 2 R. S. 195, § 243.

² 4 Kernan, 16.

* NOTE.—The Code of Procedure differs from the Revised Statutes on this subject. It declares that from the time of the docketing in the county clerk's office, the judgment shall be a judgment of the County Court. (Code, § 63, see also § 90.)

"June 10th, parties appeared and joined issue. Plaintiff complained against the defendant on promissory note, also for money lent, &c., and claimed damages to \$200. Defendant answered by denying the complaint and gave notice of a set-off, and claimed a balance of \$. On motion of defendant, cause adjourned to the 17th inst., at 10 A. M., at my office. June 17th, parties appeared, and, on motion of plaintiff, issued a venire, returnable forthwith. The following persons returned, summoned on the venire: (Here state jurors.) The following persons were sworn as jurors to try the cause:¹

"A. B. and C. D. were sworn as witnesses for plaintiff, and C. D. was sworn for defendant.

"After hearing the testimony, the jury retired under the charge of , constable, duly sworn for that purpose, and after deliberating together returned into court, the plaintiff being present and answering, and delivered their verdict, whereby they found for the plaintiff \$10 damages. Whereupon, I immediately, to wit, June 17th, rendered judgment for the plaintiff.

Damages,	.	.	.	.	.	.	.	\$10 00
Costs,	.	.	.	.	.	.	.	4 75
								\$14 75

No execution has been issued.

"TOWN OF , ss. I hereby certify that the above is a transcript of a judgment rendered before me, in the above entitled cause; that I have compared it with the original, and that it is a correct transcript therefrom, and of the whole of such original.²

Justice."

Dated August 10th, 18 .

Whenever a judgment shall be rendered by a Justice of the Peace, on default and in the absence of the party against whom the same is rendered, it shall be the duty of such Justice, on the demand of any person interested therein, to give to such person a transcript of such judgment, together with

¹ 5 Wend. 292.

² 2 R. S. 824, § 72.

a copy of the process, pleadings, and proofs in the cause, when such pleadings and proofs are reduced to writing, or the substance thereof when not reduced to writing, or such parts of such process, pleadings, and proofs as may be required on his being paid therefor, *twenty-five cents* for such transcript, *six cents a folio* for the residue thereof.¹

Of the Costs.

The judgment having been determined on in the mind of the Justice, the next subject to be considered will be the costs of the suit. It is provided by a recent statute, (see Laws 1866,) that "whenever a judgment shall be rendered in a court of a Justice of the Peace, in civil actions, it shall be with the costs of suit; but the whole amount of the items of such costs to be included in the entry of judgment, except charges for the attendance of witnesses from another county, shall not in any case exceed the sum of five dollars, *unless such suit shall be adjourned more than once at the request and on the motion of the party against whom judgment shall be finally rendered*, and in such case the costs of such *additional* adjournment may be included in the entry of judgment; and in all cases in which an issue is joined, and trial had, and the damages recovered shall exceed fifty dollars, or the plaintiff shall claim, in his complaint, a sum exceeding fifty dollars; and the defendant shall recover judgment, the prevailing party shall be entitled to costs not exceeding the sum of *ten dollars*, exclusive of witnesses fees.²

It will be perceived by the foregoing section of the laws of 1866, that the costs which may be included in the judgment have been materially increased, especially when the damages recovered, or *claimed* in the complaint, exceed fifty dollars. In those cases the Justice may tax, in the judgment to the prevailing party, his costs, not exceeding ten dollars, exclusive of witnesses fees, whether residing in the county or elsewhere.

It has often been decided by the Supreme Court that the

¹ Sess. Laws 1841, p. 114.

² Laws of 1866, Chap. 692, § 2.

costs voluntarily made by the party against whom the judgment is rendered must *not* be included in the judgment.¹

Thus, when a judgment is rendered in favor of the plaintiff, the Justice should not include in the judgment the defendant's costs, for subpoenas, swearing his (defendant's) witnesses, adjournments obtained on his motion, &c.²

And, on the other hand, the Justice must not include in a judgment in favor of the defendant, the costs of the summons, constable's fees, or any other costs which the plaintiff has voluntarily made in the prosecution of the suit.³

Although the costs of the successful party are always to be taxed in the judgment he obtains, yet if the Justice should, through mistake, or otherwise, erroneously tax in items which do not properly belong in the judgment, the judgment cannot, for that reason, be *reversed*, as will appear by the following section of the statute :

"No judgment shall be reversed, merely for the omission or misrecital of an oath, nor on account of any *fees* having been improperly allowed by a Justice."⁴

Justices' Fees in Civil Cases.

By an act of the Legislature passed April 20, 1866, chap. 692, Justices of the Peace in this State are allowed and entitled to receive the fees hereinafter stated for the following named services in civil cases :

	\$	cts.
For a summons, ...	25	
For a warrant, attachment, or transcript of judgment, each, ...	25	
For adjournment, ...	25	
For subpoena, including all the names inserted therein,	25	
For administering an oath, ...	10	
For filing each paper necessary to be filed, ...	5	
For swearing a jury, ...	25	
For swearing a constable to attend a jury, ...	10	

¹ 13 John. 350, 460.

³ 15 John. 195.

² 14 John. 369.

⁴ 2 R. S. 185, § 184, 19 Wend. 351.

	\$	cts.
For trial of an issue of fact, in case of no appearance by the defendant, ...	25	
And in case of appearance and answer, ...	75	
For entering judgment, ...	25	
For taking affidavit, ...	10	
For drawing any bond, ...	25	
For receiving and entering verdict of jury, ...	25	
For venire, ...	25	
For drawing affidavits, applications and notices in cases required by law, per folio, ...	05	
For execution, ...	25	
For renewal of execution, ...	25	
For making return to an appeal, ...	2	00
For warrant for the apprehension of any person charged with any violation of the laws concerning the in- ternal police of the State, ...	25	
For warrant for the apprehension of any person charged with being the father of a bastard, ...	50	
For indorsing any warrant issued from another county, ...	25	
For summons for any offence relating to the internal police of the State, or in any case of any special proceedings to recover the possession of lands or otherwise, ...	25	
For drawing a record of conviction for contempt, or other special cases, ...	50	
For an execution upon any such conviction, ...	25	
For warrant of commitment for any cause.	25	
For a precept to summons a jury in special cases, ...	50	
For swearing such jury, ...	25	
For hearing the matter concerning which such jury is summoned, ...	50	
For receiving and entering the verdict of such jury, ...	25	
For a view of premises alleged to be deserted, ...	50	
For hearing an application for a commission to examine witnesses, ...	50	
For every order for such commission and attending, settling and certifying interrogatories, ...	50	
For taking deposition of witnesses upon an order or		

	\$	cts.
commission issued by some court in this or a foreign state or territory, per folio, ...	10	
For making the necessary return and certificates thereto,	50	
For indorsement on affidavit in an action to recover possession of personal property, ...	25	

Justices' Fees in Criminal Cases.

Justices of the Peace in the State shall hereafter be allowed and entitled to receive the fees hereinafter stated for the following named services in criminal cases, viz :¹

	\$	cts.
For administering an oath, ...	10	
For a warrant, (but no Justice of the Peace shall be obliged to issue a warrant on any complaint for assault and battery unless the person making such complaint shall pay the fee therefor,)	25	
For a bond or recognizance, ...	25	
For a subpœna, including all the names inserted therein,	25	
For a commitment for want of bail, ...	25	
For an examination of the accused, when such examination is required by law, for each day necessarily spent, ...	1	00
For every necessary adjournment of the hearing or examination, ...	25	

Fees of Courts of Special Sessions.²

For a venire, ...	25
For swearing each witness on trial, ...	10
For swearing a jury, ...	25
For swearing a constable to attend a jury, ...	10
For subpœna, including all the names inserted therein,	25
For a trial fee, per day during the necessary and actual continuance of the trial, ...	1 00
For receiving and entering verdict of jury, ...	25
For entering the sentence of the court, ...	25

¹ Session Laws, 1866, chap. 692.

² Session Laws, 1866, § 4.

	\$	cts.
For warrant of commitment on sentence, ...	25	
For record of conviction and filing the same, ...	75	

But all such charges, in any one case, shall not exceed five dollars, unless such court continue more than one day, in such case the costs of each additional day may be added thereto.

For return to any writ of certiorari, to be paid by the county, ...	\$2	00
For services when associated with another Justice of the Peace, in cases of bastardy, for each day actually and necessarily spent, ...	2	00

§ 5. Whenever a conviction shall be had in any court of Special Sessions for any criminal offence, a record thereof shall be made by such court, and filed in the office of the clerk of the county where such conviction shall be had, within thirty days of the time of such conviction, and when any fine imposed by such court shall be paid to said court, the same shall be paid to the treasurer of the said county within thirty days after the receipt thereof, and any neglect or refusal to file such conviction or pay over said money within the period aforesaid shall be deemed a misdemeanor.

*Constable's Fees in Civil Actions.*¹

Constables shall hereafter be allowed for services rendered in civil actions the following fees :

	\$	cts.
For serving a warrant or summons, ...	25	
For a copy of summons on request of defendant, or left at defendant's dwelling in his absence, ...	15	
For serving an attachment, ...	75	
For copy of the attachment and inventory of the property seized, left at the last residence of the defendant, ...	75	
For serving an execution, for every dollar collected to the amount of fifty dollars, ...	05	

¹ Laws of 1869, chap. 820.

	\$	cts.
For every dollar collected over fifty dollars, . . .	2	$\frac{1}{2}$
For every mile traveled, (going and returning,) to serve a summons, warrant, attachment or execution, the distance to be computed from the place of the abode of the defendant, or where he shall be found, to the place where the precept is returnable, . . .	10	
For notifying plaintiff of the service of a warrant, . . .	25	
For going to plaintiff's residence, or where he shall be found, to serve such notice, for each mile traveled, going and returning, ...	10	
For subpoenaing witnesses, not exceeding four, . . .	25	
For summoning a jury, ...	75	
For summoning a jury to assess damages in proceed- ings relative to highways, ...	2	00
For serving affidavit, notice and summons in action to recover possession of personal property, . . .	50	
For a copy of such affidavit, notice and summons left with defendant, his agent, or at the last place of abode of the defendant, ...	50	
For every mile traveled, (going and returning,) to serve such affidavit, notice and summons, the dis- tance to be computed from the place where the pre- cept is returnable to the place of abode of the de- fendant, or where he shall be found, ...	10	
For taking charge of a jury during their deliberations, . . .	50	

Constables' Fees in Special Proceedings.

For serving a summons, ...	25
For serving a warrant, ...	50
For arresting and committing any person pursuant to process, . . . , ...	1 00
For every mile traveled, (going and returning,) in each case, ...	10

*Constable's Fees in Criminal Cases.*¹

Constables shall hereafter be allowed the fees hereinafter stated for the following services in criminal cases :

¹ Laws of 1869, chap. 820, § 8.

	\$	cts.
For serving a warrant, ...	75	
For every mile traveled, (going and returning,)	10	
For taking defendant into custody on a mittimus, ...	25	
For every mile traveled in taking the prisoner to jail, (going and returning,)	10	
For taking charge of a jury during their deliberations, ...	50	
For attending any court pursuant to a notice from the sheriff for that purpose, for each day, ...	2	00
And for each mile traveled in going to and returning from such court, ...	5	

Which fees shall be chargeable to the county and shall be paid by the treasurer thereof on the production of the certificate of the clerk, specifying the number of days and distance traveled.

To entitle any constable or other officer to the increased or additional travel fees, provided for in this act, such constable or officer shall show by affidavit that such travel was necessary on the process on which it was charged, that no more miles are charged for than was actually and in good faith traveled on the execution of such process, and that such constable or officer at that time had no other official or private business on such traveled route, and that the charge for going and returning was made only upon one process, which process shall be attached to or described in such affidavit, and such additional or increased travel fees shall not be allowed by any court or auditing board, unless such court or auditing board shall be satisfied that the miles charged were actually and necessarily traveled on the process named, and on that process only.¹

Form of Affidavit.

County, ss:

being duly sworn,
says that he traveled miles, going and returning, to
serve the within process, the distance being computed from
the place of the abode of the *defendant* , or where *he*

¹ Laws of 1869, chap. 820, § 2.

item of costs or fees, improperly, and the same be collected, the person paying the same, may, notwithstanding such judgment, recover of the party who shall have received such costs or fees, the amount thereof, with interest.

Constable's Fees for Services

In the foregoing Special Proceedings, not provided in the Bill of Fees relating to Proceedings in the Justices' Court.

And for any services not herein provided for, which may be rendered by a constable, the same fees as are allowed by law to sheriffs for similar services; among which are the following:

Putting any person entitled, into the possession of premises, and removing the tenant, one dollar and twenty-five cents; (and the same traveling fees as upon an execution;)¹

Summoning a jury, to try the title to any personal property, attending such jury, &c., one dollar and fifty cents;

Summoning a jury, pursuant to any precept or summons of any officer in any special proceedings, one dollar; and for attending such jury, when required, fifty cents.

A constable is not entitled to fees for traveling to serve a criminal warrant, unless the service is actually made, though the party sought to be arrested cannot be found.

It seems the rule is universal that an officer is not entitled to fees for traveling to serve process, unless the service is made.²

¹ 2 R. S. 537.

² *Exparte Wyles*, 1 Denio, 685, *Beardsley, J.*

CHAPTER X.

Of the Execution.

Upon any judgment being rendered before a Justice, he shall issue execution, at the time and in the manner hereinafter prescribed.

Execution may be issued on a judgment heretofore or hereafter rendered in Justices' Court, at any time within five years after the rendition thereof, and shall be returnable sixty days from the date of the same.¹

If the judgment be docketed with the county clerk, the execution shall be issued by him to the sheriff of the county, and have the same effect and be executed in the same manner as other executions and judgments of the County Court, except as provided in section sixty-three.

A Justice is also authorized to issue an execution forthwith upon the rendition of a judgment, and without requiring an oath for that purpose ; in all cases it must be returnable in sixty days, instead of thirty and ninety, as heretofore required ; and in my judgment it is his duty, in all cases, to issue execution immediately upon entering the judgment, unless otherwise directed by the plaintiff or his agent. In issuing execution, the Justice acts ministerially, and of course would be held responsible for ordinary care and diligence in the collection of the demand after judgment.

I. Of the form of the Execution.

The form of the execution was prescribed by the Revised Statutes as follows :²

§ 131. It shall be directed to any constable within the same county, and shall command him to levy the debt or damages, and costs, of the goods and chattels of the person

¹ Code. § 64. sub. 12, 13.

² R. S. 249, [4th ed. p. 446.]

